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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

APEX OIL COMPANY,

Petitioner,

– against –

JOSEPH DiMAURO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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160 pp

Questions Presented

1. Whether, in opposing motions for summary judgment filed on behalf of a federally regulated commodities exchange and its Vice-Chairman, plaintiff adequately established the "bad faith" element of its failure properly to regulate claim by demonstrating that the defendants knew of a conspiracy to manipulate the market but failed to take any action to prevent it — or whether, in addition, plaintiff was required to show self interest or other ulterior motive, and further, that such motive was the sole or dominant reason for the defendants' failure to act?[1]

2. Did the Court of Appeals, having determined, under the summary judgment standards set forth by this Court in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), that the record presents a triable issue of antitrust conspiracy among certain defendants, deny plaintiff its right to a jury trial by granting summary judgment to alleged co-conspirators because the evidence against them did not satisfy the same exacting *Monsanto* standards?

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[1] If the Petition is granted, Petitioner also will argue that even under the more stringent standard applied below the evidence is sufficient to create a triable issue of bad faith.

List of Parties

The parties to this proceeding are:

1. Petitioner Apex Oil Company.[2]

2. Respondents Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New England, Inc., and Belcher New Jersey, Inc.

3. Respondent Joseph DiMauro.

4. Respondent Eastern of New Jersey, Inc.

5. Respondent New York Mercantile Exchange.

6. Respondent Julian Raber.

7. Respondents Stinnes Corporation and Stinnes Interoil, Inc.

8. Respondent TIC Commodities, Inc.

9. Respondent Triad Petroleum, Inc.

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[2] Apex Oil Company is a Missouri general partnership and, thus, has no parent company. The general partners are: Novelly Oil Company ("Novelly") and Goldstein Oil Company ("Goldstein"), Missouri corporations. Novelly has no parent company. The parent company of Goldstein is S.C.R. Investment Company. Apex Oil Company, Novelly and Goldstein have no subsidiaries (except wholly owned subsidiaries) or affiliates as those terms are used in Supreme Court Rule 28.1.

List of Parties to the Proceedings Below

In addition to those set forth in the foregoing List of Parties, the parties to the proceedings below were:

1. George E. Warren Corporation. Apex and George E. Warren Corporation settled this case following entry of the Second Circuit's decision and judgment and the case was dismissed as to George E. Warren Corporation.

2. Northeast Petroleum Corporation and Northeast Petroleum Industries, Inc. (collectively "Northeast"). Apex and Northeast settled this case after argument in the Court of Appeals and the appeal was dismissed as to Northeast.

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APEX OIL COMPANY,

Petitioner,

– against –

JOSEPH DiMAURO, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered on June 17, 1987, which affirmed in part and reversed in part the judgment of the United States District Court for the Southern District of New York granting the Respondents' motions for summary judgment and dismissing Petitioner's amended complaint as against each of them.

Opinions Below

The opinion of the Court of Appeals (reproduced in the Appendix at A3-36)[3] is reported at 822 F.2d 246. The District Court's opinion (reproduced in the Appendix at A41-115) is reported at 641 F. Supp. 1246.

[3] The Appendix to the Petition is cited as "(A____)."

Jurisdiction

The judgment of the Court of Appeals was entered on June 17, 1987 (A3-36). By order dated July 21, 1987, the Court of Appeals denied a timely petition for rehearing (A37-38). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the Seventh Amendment; Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1,2); Sections 5a(8) and 5(d) of the Commodity Exchange Act ("CEA") (7 U.S.C. §§ 7a(8) & 7(d)); and Rule 56 of the Federal Rules of Civil Procedure. These provisions are reproduced in the Appendix at A117-21.

Statement of the Case

1. *Preliminary Statement.* — In February 1982, Petitioner Apex Oil Company ("Apex") was the predominant seller ("short") of No. 2 heating oil futures contracts ("February Contracts") traded on Respondent New York Mercantile Exchange ("Exchange") (A8-9). Contrary to industry practice, in violation of Exchange rules and procedures and inconsistent with their individual economic self-interest, certain buyers of these contracts ("longs") nominated for delivery of product in the first three delivery days of the month at one delivery site. Faced with the resulting congestion and (i) the inability to obtain oil from its nationwide system in time to avoid a default, (ii) the refusal of the longs to exhibit the cooperation and flexibility that had previously characterized the market and (iii) the failure of the Exchange to perform its statutory obligations to enforce its delivery rules, maintain an orderly market and prevent manipulation, Apex was compelled to pay supracompetitive prices to obtain oil for immediate delivery in order to avoid a default.

Apex commenced this action in March 1982 against the respondents and others[4] alleging violations of Sections 1 and 2

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[4] Certain defendants in the District Court were dismissed from the case prior to these proceedings pursuant to stipulations and, in one case, pursuant to

(Footnote Continued)

of the Sherman Act (15 U.S.C. §§ 1 and 2), Sections 5(d), 5a(8), 4b, 9(b) and 13(a) of the CEA (7 U.S.C. §§ 7(d), 7a(8), 6b, 13(b) and 13c(a)), Section 340 of the New York General Business Law (McKinney 1968) and the common law.[5]

Apex's amended complaint alleges that, commencing no later than February 1, 1982, the long defendants engaged in a concerted attempt to manipulate the market for No. 2 oil in New York Harbor (A13-15). Seeking to accomplish collectively that which could not be achieved individually, the long defendants conceived of, and implemented, a scheme for the early nomination of, and, thereafter, continued early demand for, No. 2 oil deliverable during February 1982 in New York Harbor, pursuant to February Contracts (*Id.*). This scheme — the success of which was aided by the exchange defendants' knowing failure to enforce its delivery rules and procedures and knowing failure to take any other steps to prevent the manipulation — had the purpose and effect of artificially raising the price of No. 2 oil, thereby allowing the long defendants to realize unlawful profits (*Id.*).

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court order. Two other defendants settled with Apex on appeal, one following oral argument and the other following entry of the Court of Appeals' decision and judgment. These latter two defendants are identified in the List of Parties to the Proceedings Below, which appears *supra* at p. iii.

For the convenience of the courts below, the defendants were divided into two groups. The "long defendants" are: (i) Joseph DiMauro ("DiMauro"); (ii) Triad Petroleum, Inc. ("Triad"); (iii) TIC Commodities, Inc. ("TIC"); (iv) The Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New Jersey, Inc. and Belcher New England, Inc. (collectively "Belcher"); (v) Stinnes Corporation and Stinnes Interoil, Inc. (collectively "Stinnes"); (vi) Eastern of New Jersey, Inc. ("Eastern"); (vii) Northeast Petroleum Corporation and Northeast Petroleum Industries, Inc. (collectively "Northeast"); and (viii) George E. Warren Corporation ("Warren"). Also included is former defendant Global Petroleum Corporation ("Global"). The "exchange defendants" are: (i) the New York Mercantile Exchange ("Exchange"); and (ii) Julian Raber ("Raber"), Vice Chairman of the Exchange.

[5] Jurisdiction in the District Court was founded upon Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26), upon provisions of the CEA (7 U.S.C. §§ 1-26), upon Sections 1331, 1332 and 1337 of Title 28 of the United States Code, and under the doctrines of ancillary and pendent jurisdiction.

After discovery, the defendants filed six motions for summary judgment, collectively embracing each of the claims asserted in the amended complaint. The District Court granted each motion for summary judgment and entered judgment dismissing the amended complaint (A116).

With respect to the antitrust conspiracy claims, the District Court viewed this Court's decisions in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 (1986), which was handed down after the motions for summary judgment were filed, and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), as requiring it to "give searching scrutiny to the inferences available from the typically ambiguous mass of evidence" (A55), "carefully parse inferences" (A58) and to treat such evidence "skeptically" (A59). The District Court believed that "dissection" of each piece of evidence was mandated and engaged in fact determination based on a paper record (A63). Through this process, the District Court rejected each piece of evidence proffered by Apex (standing alone) as inadmissible or ambiguous and therefore insufficient to submit the case to a jury. It consequently granted summary judgment as to each defendant on Apex's conspiracy claims.

With respect to Apex's claim against the exchange defendants for failure properly to regulate, the District Court, having found no genuine issue of conspiracy, stated that the evidence demonstrates that the conduct of the exchange defendants was not unreasonable and therefore was insufficient for Apex to meet its burden of establishing that those defendants acted in bad faith (A96-105).

The Court of Appeals reversed the District Court's holding that Apex failed to produce evidence sufficient to raise a triable issue of conspiracy among any of the defendants (A15- 34). The Court of Appeals reasoned that the "incriminating nature" (A22) of Apex's "strongest evidence of a conspiracy" (A21) – handwritten notations memorializing a telephone conversation on February 3 between officials of Global and Northeast and supporting a reasonable inference of an agreement between them

to take the actions set forth in the margin[6] – coupled with their parallel conduct in nominating early and insisting upon strict compliance with those nominations would require a finder of fact to decide whether their denial of conspiracy should be accepted (A24).

While Apex had settled its claims against these defendants (*see* note 2 *supra*), the court found the specific evidence against them relevant to interpreting additional communications among certain other defendants (*Id.*). The court found that the "striking" similarity of handwritten notes of a telephone conversation between officials of Respondent Belcher and Global would permit a finder of fact to infer Belcher's participation in the conspiracy between Global and Northeast, especially if the evidence was viewed in light of handwritten notations, made by an officer of Belcher two days earlier, to the effect that Belcher would "demand *delivery*" (emphasis in original) "look for default" and "Merc – EFP" (A24). Several pages later, in another notation for February 1, the notebook reads, "Sat. demand 12:01 Sat. [February 6] a.m."; and in notations for February 2 appear the words "promote crunch" and "press for default" (*Id.*).

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[6] The notations are as follows:

DAO[liver]

Re Merc nominations

(1) All nominations in writing

(2) If not accepted NPC to demand $100.00/contract/day penalty for 5 days

At end of 5 days window NPC to demand 10 Pct penalty + oil plus go to court

(3) NPC to go to newspaper and expose exchange

(4) All loadings must be GATX

(5) [Final line intentionally obliterated]

(A21).

Accordingly, the Court of Appeals held that "in light of all the circumstances, including communications among the defendants and their parallel conduct, we must conclude that sufficient evidence has been produced from which a fact-finder could infer that Belcher, Global, and Northeast 'had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement' " (A27). It therefore reversed the dismissal of the antitrust conspiracy claims and the manipulation claim as to Belcher.

The Court of Appeals affirmed, however, as to the remaining long defendants, rejecting all of Apex's other evidence — although it professed to "remain aware that 'once a conspiracy is shown, only slight evidence is needed to link another defendant with it' " (A28).

The Court also affirmed the dismissal of Apex's failure properly to regulate claim against the Exchange and its Vice-Chairman, Julian Raber (A35). It agreed with the District Court's conclusion that Apex's evidence was insufficient to establish that the exchange defendants' failure to act was the result of bad faith as interpreted in Second Circuit decisions (*Id.*). The court therefore affirmed the dismissal "for the reasons stated in the district court opinion" (*Id.*).[7]

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[7] The District Court stated as an alternative basis for dismissing this claim that "there is insufficient probative evidence either of a conspiracy to manipulate or that the exchange defendants knew of any such conspiracy" (A103). Although not specifically commented on by the Court of Appeals, this alternative holding obviously does not withstand scrutiny. There is sufficient evidence to give rise to a genuine issue of conspiracy, as the Court of Appeals held, and full knowledge of that conspiracy on the part of the exchange defendants. Even the limited evidence of knowledge rejected by the District Court is, in and of itself, sufficient to submit the question of knowledge to a jury, as is made clear by the District Court's improper comments concerning its weight (*see* A103) ("What Raber may have thought after all was said and done does not establish the state of his knowledge on February 5 and 6. Helfer's emotional statements are of little evidentiary value, particularly in light of the fact that he admittedly had an interest in heating oil contracts.").

2. *Record Evidence.* — The evidence submitted in connection with the motions for summary judgment establishes the following undisputed facts and genuine issues of material fact for trial by a jury.

a. *Introduction and Conspiracy*

The Exchange has been certified by the Commodity Futures Trading Commission ("CFTC") as a contract market for the trading of certain futures contracts, including February Contracts (JA1892-905).[8] As such, the Exchange is obligated by federal statute to assume certain duties and responsibilities, including the maintenance of an orderly market and the prevention of manipulation by those that trade in its contracts. CEA §§ 5(d), 5a(8) (7 U.S.C. §§ 7(d), 7a(8)).

The rules of the Exchange provided that any February Contracts not liquidated by Friday, January 29, 1982 — the close of trading for such contracts — would be matched long with short (A8). At the close of trading, Apex was short 4,378 contracts. Of the 4,906 February Contracts open at the close of trading, 1,945 were held by the long defendants, or their affiliates (A9).

A short had two means available to satisfy delivery obligations (A8). First, under rules discussed below, the short could work out with the matched longs the time, place and method of delivery (*Id.*). Second, delivery obligations pursuant to the futures contract could be satisfied by means of an "exchange futures for product" transaction ("EFP") (*Id.*). In an EFP, the futures contract is superseded by a new contract to deliver oil on the cash ("wet") market (*Id.*).

In describing its No. 2 heating oil contract to the industry, the Exchange staff stated that the delivery rules were premised

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[8] "JA" citations are to the Joint Appendix (11 volumes) submitted by the parties to the Second Circuit. For the Court's convenience, one complete set of the Joint Appendix was transmitted herewith and lodged with the Clerk of the Court.

on "flexibility" by both longs and shorts (JA3816-17; *see also* JA3805-06). To that end, in the months prior to February 1982, deliveries under No. 2 heating oil contracts were characterized by a number of flexible procedures (A10-11). At a Board of Governors meeting on Wednesday, February 3, 1982, the Exchange formally adopted these procedures and, thereafter, certified to the CFTC that the revisions merely "formalize[d] the Exchange's *current* delivery procedures" (A97 emphasis added).

Under Exchange rules and practices as they existed prior to February 1982, the procedures were as follows. First, in filing their Initial Delivery Instructions forms, longs were required to allow a "five day window" during which a short could initiate and complete delivery (A97). Second, all longs were required to give a short at least three days (72 hours) notice of any proposed lifting and, in measuring this limitation, any notice given after 12:00 noon was deemed to be conveyed the next business day (*Id.*). Third, a seller who was unable or unwilling to deliver in accordance with a buyer's Initial Delivery Instructions form was entitled to have revised delivery instructions submitted (*Id.*). Each of these procedures was intended to, and did, allow increased flexibility in the delivery system (JA5180-83). The exchange defendants refused to enforce any of these procedures in connection with deliveries pursuant to the February Contracts.

On February 1, 1982, as required by the rules, Apex designated delivery sites for all of its February Contracts (A10). Following past practice, GATX terminal in Carteret, New Jersey, was initially designated for 4,281 contracts (*Id.*, A22). BP Terminal at Tremley Point, New Jersey, was designated as the delivery site for the remaining contracts[9] (*Id.*). On the same day, pursuant to Exchange rules, each long defendant submitted a "Notice of Intention to Accept Petroleum Products Futures." The Clearing House then matched up longs and shorts for delivery (*Id.*).

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[9] As in prior months, Apex designated a limited portion of its delivery obligations from the BP Terminal to facilitate truck deliveries (A47).

All but 15 of the open long positions held by the long defendants were designated by the Exchange for delivery by Apex (*Id.*). The Exchange rules then required each long to nominate a delivery date and method by 4:30 p.m. on the 5th business day of the month, here February 5, 1982 (*Id.*). The first day for which delivery could be sought was February 6, 1982 (*Id.*).

Prior to February 1982, the nominations by holders of long positions typically sought delivery throughout the month (A10-11). Even in December and January, when, as in February, the market price of No. 2 oil was falling (A23), none of the long defendants bunched their nominations together during the first few delivery days (A11). Moreover, they observed industry flexibility and changed their initial nominations when necessary to facilitate delivery by reasonably spreading delivery throughout the month (*Id.*).

This pattern was broken in February 1982 (A11). It is undisputed that the long defendants nominated a large number of contracts for the first few delivery days (*Id.*). In over 75% of these nominations, delivery was demanded for one of the first three delivery days (A23). In contrast, only 19% of the long positions held by non-defendants were nominated for this period (*Id.*).

During the time these nominations were being made, there were numerous communications among the long defendants (A21). The subjects of these communications were the very nominations at issue. These discussions evidence a high degree of coordination among the long defendants, at the heart of which was Respondent DiMauro, his brokerage companies Respondents TIC and Triad, and his clients Respondents Eastern and Stinnes.

b. *Exchange Liability*

When the nominations for early delivery began to be received by the Exchange on February 2, an Exchange employee told her supervisor that there were "a huge amount of nominations in the first day of delivery" (JA5156). The supervisor reviewed the nominations, corroborated this conclusion and transmitted the information to the head of the Exchange Clearing House (*Id.*).

The concern exhibited by this Exchange employee was foreshadowed by an internal Exchange memorandum acknowledging that "[t]he potential for market disruptions in its futures contracts is an ever-present reality for the New York Mercantile Exchange" (JA5138). In this same memorandum, the Exchange staff expressly recognized that longs might attempt a squeeze on shorts, and the Exchange reviewed its obligations should such a squeeze occur (JA5138-50, 5154-55). It concluded:

> During a squeeze on the shorts, the appropriate choice of actions may include: . . . extending the time for delivery and changing or adding delivery points.

(JA5154-55).

In addition to the supervisor's report concerning the early nominations, the head of the Exchange Clearing House also received telephone calls from both a broker for Northeast and Global, and a trader for another company, who was also a member of the Exchange's Petroleum Advisory Committee (JA5157-64, 3920). In those conversations, it was conveyed that the longs were "getting together" for the purpose of demanding delivery early in the month (*Id.*). Northeast's broker even disclosed to the Exchange that a meeting had been scheduled by DiMauro, a broker for several of the long defendants, for that very purpose (JA5158-60). Yet, by the end of the day, the Exchange had taken no concrete action to address the situation.

On February 3, a floor broker informed the Exchange's Control Committee,[10] chaired by Richard Helfer, that "he had learned from industry sources that Apex did not have oil to deliver to his customers" (A50), and that "one or two of his customers were out to get Apex" (A68). On the same day, the Exchange learned from four different sources that DiMauro was also claiming that Apex would have trouble delivering on the February Contracts (JA5171-72). Although by this time the Exchange had substantial evidence upon which to believe that a squeeze was being

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[10] Under the By-laws of the Exchange, the Control Committee was charged with authority "to correct any circumstances which interfere(s) with or might interfere with the normal functioning of the market," including a short "squeeze" (JA3609-10).

pursued, it took no meaningful steps to intervene and accepted nominations that, on their face, violated existing delivery rules and procedures.

On February 4-5, 1982, long defendants Stinnes and Eastern caused an additional 50 contracts to be nominated for delivery between February 6-8 and 300 contracts to be nominated for delivery by inventory transfer on February 6, 1982. All of the nominations called for delivery by Apex at the GATX terminal (A48-49). Significantly, the nomination of the 300 contracts for delivery on February 6, 1982 was in clear violation of Exchange rules, as the required prior approval (which would permit an inventory transfer) was not sought from Apex and the nominating long defendant failed to give Apex the required 72 hours notice of the nomination. Despite the foregoing, the exchange defendants not only accepted the nominations as valid, but threatened Apex with default sanctions if the nominations were not satisfied (A100).

On February 4, as the early nominations continued to mount, the Exchange suggested that Helfer disqualify himself due to an alleged conflict and installed Raber as acting chairman of the Control Committee (A97). At this point, the Committee was aware that the longs had nominated 657 contracts for delivery on February 6, 50 for February 8 and 70 for February 10 (*Id.*).

As the day progressed, the Exchange's Chief Compliance Officer considered whether the Exchange should declare an emergency because the "longs ganged up by selection of 2/6" (JA5008). The Control Committee also considered whether to fix a delivery price, extend the delivery time or change delivery sites to avoid congestion (A98, JA5008). Neither on February 4, 1982, nor at any other time, did the exchange defendants exercise any of these options — any one of which could have brought the squeeze to an unsuccessful end. While the exchange defendants did tell Apex's clearing member, Goldman Sachs & Co. ("Goldman"), not to be concerned with the February 5 nominations (a position they later reversed) (A99-100), in all

other respects they proved unwilling to require the long defendants to conform their nominations to Exchange rules (JA4426). At the same time, the exchange defendants informed Apex that failure to satisfy the nominations could constitute a default and trigger onerous monetary penalties.

On February 4 and 5, the Committee also met with clearing members representing longs matched with Apex and asked, but did not require, them to change delivery times and sites (A10). Apex's own requests to change delivery dates, methods or sites were either ignored or rejected by the long defendants (*Id.*). The united front assumed by the long defendants, and the exchange defendants' refusal to enforce the Exchange's delivery rules and practices deprived Apex of the ability to use oil in its nationwide system to satisfy its obligations under the February Contracts (A10-11). Faced with millions of dollars in threatened delinquency penalties if it stood on its rights, Apex capitulated by entering into extremely disadvantageous "settlement" arrangements with the long defendants (A11).

As a result, by the end of the day on February 5, 1982, all of the early delivery nominations had been resolved with the exception of belated nominations by two of DiMauro's clients, Stinnes and Eastern (A98-99). The Stinnes nomination concerned 300 contracts nominated on February 4 and the Eastern nomination concerned 50 contracts nominated on February 5, 1982 (*Id.*).

On February 5, Raber and DiMauro privately conferred about the Stinnes and Eastern nominations (A50-51). Both Helfer and the Exchange's Chief Compliance Officer were opposed to this meeting (A99). Helfer told the Control Committee and members of the Exchange staff that he "could not condone anything that was being done at that point" (*Id.*), and angrily added that "[y]ou are all going to jail, you can't do this . . . these people are taking us to the cleaners and you are going to jail if you agree to do what they are trying to make you do . . . . You know what is going on around here, they are making people pay 97 cents for oil" (*Id.*). Helfer then wrote out the following statement which he demanded Raber sign: "Please be advised that

Richard Helfer bears no responsibility for any decision made on behalf of the Control Committee regarding difficulties concerning the delivery of the Feb. 1982 heating oil contracts" (*Id.*).

The Stinnes and Eastern nominations were clearly invalid for a number of reasons brought to the attention of Raber and his staff by Goldman (A99-100). Nevertheless, Raber and the other Exchange officials refused to declare the nominations invalid (A99-101).

Despite assurances the prior evening that the status quo would be maintained until Monday, on Saturday morning, February 6, 1982, the Exchange compelled Apex to settle with Eastern and Stinnes, in a transaction that was "brokered" by the Exchange (JA3725-26, 4409-10). The President of the Exchange spoke with Goldman and warned that, if the nominations were not resolved that day, the Exchange might decide on Monday that both Goldman and Apex had been "delinquent" on Saturday and Sunday under Exchange rules (A100). The Exchange conveyed a similar threat to Apex, stating that "the delinquency clock would be running" and that immediate settlement was required (*Id.*).

Confronted with the continued insistence by Stinnes, Eastern and the exchange defendants that the nominations be met, Apex reluctantly agreed through DiMauro to pay Stinnes and Eastern 97.5 cents per gallon for No. 2 oil that was immediately delivered back to Stinnes and Eastern by book transfer at the February Contracts closing price of 89.7 cents per gallon (*Id.*). DiMauro sought, but was refused, a "hold harmless" agreement (JA2457-58, 3848-49, 3943-44).

During the second week of February 1982, the Exchange held a staff meeting at which the deliveries made on the February Contracts during the prior week were reviewed (JA4411). The Chief Compliance Officer made notes at the meeting: next to the word "collusion" appears the word "longs"; mention is also made of a Justice Department referral (JA5010-11).

On February 10, 1982, Raber met with representatives of Apex (JA5000-01, 5184-85). He conceded that there had been

a conspiracy to "squeeze" the shorts and boasted that it was "resolved" only after he threatened to have the Department of Justice investigate the matter (JA5000). Raber also admitted that he had deliberately refrained from calling a meeting of the Exchange's Board of Governors because such an action might trigger a repetition of the potato fiasco (JA5184-85), an obvious reference to the role of the Exchange in the manipulation in 1976 of Exchange potato contracts, which was the subject of one of this Court's opinions. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982). Raber affirmed that there was "collusion" among the long defendants who had been "out to get [Apex]" (JA5185). Quite appropriately, he referred to the entire episode as a "sting" (JA5184).

Reasons for Granting the Petition

I. The First Question Presented Was Wrongly Decided Below, Poses A Federal Statutory Issue Of Major Importance On Which The Federal Courts Are In Conflict And Should Be Resolved By This Court At This Time

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982), this Court sustained a private right of action under the CEA against an exchange that knew, or should have known, of conspiracies to manipulate the market but failed to perform its statutory duty to prevent manipulation. This case presents a difficult and important question left open in *Curran* – the elements of liability necessary to put such a claim before a jury.

In response to the motion for summary judgment filed on behalf of the Exchange and Respondent Raber, Petitioner came forward with competent evidence that the Exchange and Raber knew of a conspiracy to squeeze Apex but failed to enforce its delivery rules or take any other action to prevent the manipulation. The courts below rejected Petitioner's argument that this evidence was sufficient to establish a genuine issue of bad faith, reasoning that Apex had failed to demonstrate "self interest or other ulterior motive unrelated to proper regulatory concerns," and further, that such motive "was the sole or dominant reason" for the failure to act (A101).

Petitioner submits that these additional requirements go far beyond what is necessary to demonstrate bad faith. A proper definition of bad faith is critical if the private remedy provided by the CEA is to have its intended deterrent effect. The standard imposed below constitutes an almost insurmountable barrier to private litigants and will, if permitted to stand, eviscerate the private right of action long recognized by the courts and expressly recognized by Congress.

The holding below is in direct conflict with a number of federal court decisions finding that, where an exchange knows of manipulation but fails to take any action to prevent it, the exchange is guilty of bad faith. As set forth below, this is the only standard that adequately balances the public interests in exchange autonomy and fair trading. For this reason, the Commodity Futures Trading Commission ("CFTC"), the federal agency charged with responsibility for administering and enforcing the CEA, has consistently advocated this standard as the proper definition of bad faith in circumstances such as those present here.[11]

* * *

Congress has regulated the commodities markets for over sixty years. From the outset it "has recognized the potential hazards as well as the benefits of futures trading." *Curran*, 456 U.S. at 360. Congress has therefore required that all trading take place on approved exchanges and that those exchanges police themselves, prevent manipulation and prohibit their members from disseminating misleading market information. While exchanges promulgated rules and regulations to fulfill these conditions, they did not always enforce them. To correct this flaw in the self-regulation concept, in 1968, Congress enacted CEA Section 5a(8), which requires the exchanges to enforce their rules.

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[11] *See, e.g.*, Brief of Commodity Futures Trading Commission, *amicus curiae*, filed August 7, 1987, in *Vaccariello v. Financial Partners Brokerage Ltd., et al.*, (Nos. 86-2918, 2926, 2936, 2937, 3006, 3008, 3064) (7th Cir. consolidated appeals pending); *see also Jordan v. New York Mercantile Exchange*, 571 F. Supp. 1530, 1539 (S.D.N.Y. 1983), *aff'd in part and rev'd in part sub nom. Sam Wong & Son, Inc. v. New York Mercantile Exchange*, 735 F.2d 653 (2d Cir. 1984).

In 1974, Congress enacted a series of comprehensive amendments to the CEA. Prior to these amendments, the federal courts routinely and consistently recognized an implied private cause of action on behalf of plaintiffs seeking to enforce and to collect damages for violation of provisions of the CEA or rules and regulations promulgated pursuant to the statute. This right of action, coupled with the enactment of Section 5a(8), gave rise to a problem. During the hearings on the 1974 amendments, the exchanges complained that they were being sued for not enforcing their rules and were therefore reducing, not expanding, exchange regulations designed to insure fair trading.

In *Curran*, this Court rejected the argument that Congress responded to this problem by eliminating the implied private remedy. Instead, the Court found that Congress viewed private litigation against exchanges as a valuable component of the self-regulation concept. As the Solicitor General argued on behalf of the CFTC as *amicus curiae*, "the private cause of action enhances the enforcement mechanism fostered by Congress over the course of 60 years." 456 U.S. at 387. Thus, while Congress took the complaint of the exchanges seriously, it responded not by eliminating the private action but rather by authorizing the CFTC to supplement exchange rules. "Only this course was consistent with the expressed purpose of the 1974 legislation, which was to 'amend the [CEA] to *strengthen* the regulation of futures trading.' " 456 U.S. at 384 (emphasis in original).

In 1982, Congress acted again and amended the CEA to provide for an express right of action against exchanges (and their officers) for, among other things, failure to enforce their rules. 7 U.S.C. § 25(b)(4). This statute states that a necessary element of liability is proof that the defendant "acted in bad faith in failing to take action or in taking such action as was taken." 7 U.S.C. § 25(b)(4). However, the element of "bad faith" is nowhere defined, since Congress merely codified existing case law. *Brawer v. Options Clearing Corp.*, 807 F.2d 297, 302 (2d Cir. 1986), *cert. denied*, 56 U.S.L.W. 3205 (1987).

The bad faith element of exchange liability has been required at least since the decision in *Daniel v. Board of Trade*, 164 F.2d

815 (7th Cir. 1947). In that case the Court of Appeals sustained a complaint against the Board of Trade of the City of Chicago challenging certain regulations adopted by the Board in response to a market emergency. The Court stated that "[s]uch action as the Board and Clearing might take pursuant to such rules, regulations, and by-laws was binding upon the plaintiffs, as long as the Board and Clearing acted impartially, objectively, honestly, and in good faith." 164 F.2d at 819.

Courts following *Daniel* have articulated the basis for the bad faith requirement. Self-regulation is the cornerstone of the federal regulatory scheme. The concept reflects a recognition that members of the affected industry can exercise control over exchange practices that is more expert, expedient and efficient than government can supply. Accordingly, the courts have been reluctant to subject every action by an exchange to review in private damage actions.

Conversely, the public interest demands that contract markets be free of manipulation and misinformation. The federal statute thus requires exchanges, as a *quid pro quo* for self-regulation, to adopt and to enforce rules designed to prevent these abuses. However, the same interested involvement in the affected industry that gives exchange members expertise can provide them with an incentive to regulate less zealously than the public interest might require. The bad faith requirement therefore provides only a "qualified immunity" for exchange action or inaction in an effort to strike the appropriate balance between the interests of exchange autonomy and the protection of the investing public from market abuses.

The standard of bad faith articulated by the courts below does not strike the proper balance. As this Court recognized in *Curran*, the private right of action is an effective mechanism for encouraging vigorous enforcement of the CEA by exchanges. Where, however, the bad faith element of liability is given an overly stringent definition, as it was below, the remedy loses force as a deterrent. Exchanges will then be encouraged to refrain from making the hard choices that regulatory responsibility entails. This will defeat the primary purpose of self-regulation and produce, by design, a result analagous to that noted in *Curran* –

the relaxation of market vigilance by exchanges to avoid liability. The real world consequences of this will include frequent market disruption with the attendant infliction of injury on industry members and the investing public, with the latter being forced to pay higher commodities prices. More importantly, however, the long-term effects on the economy will be even more severe.

Futures markets fulfill a critical role in our economy by making it possible for producers and processors of commodities to "hedge" against adverse price movements. A producer who takes a "short" position is protected against a price decline, whereas a processor who takes a "long" position is protected against a price increase. This makes more rational planning possible and thus promotes efficiency.

Hedging is made possible only by the availability of "investors" (or "speculators") – parties willing to assume the market risk that the hedging party wants to avoid. "[W]ithout their participation, futures markets 'simply would not exist.' " 456 U.S. at 359.

Investors' opportunities for profit are based upon their ability to predict future price movements. These predictions are made difficult by such things as weather and other imponderables – they are impossible in a market that is being manipulated. Thus, manipulation, or the threat of it, reduces the attractiveness of the market to investors and therefore decreases the liquidity in the market. Trading in such commodities is adversely affected and hedging becomes increasingly difficult.

It is for these reasons that the CEA imposes a duty on exchanges to prevent manipulation. This duty is not discretionary, it is mandatory. Of course, exchanges must have discretion to respond to manipulation in the manner they judge best – but they must respond, and the failure to take any action is a clear abdication of their public duties.

Thus, many federal courts have found that the balancing of competing interests in these circumstances is more sensitive than

the courts below recognized. These courts have held that the standard of bad faith should be less demanding where, as here, the claim is based upon the failure to take action mandated by the CEA and exchange rules. For example, in *Jordan*, the District Court agreed with the CFTC that "[w]here an exchange knows or should know of wrongful market conduct that it is empowered and required to control, a nondiscretionary duty to take some action arises, and the failure to satisfy that duty constitutes conduct amounting to a bad-faith exercise of the exchange's statutory responsibilities." 571 F. Supp. at 1540.

The approach articulated by the court in *Jordan* strikes the proper balance between exchange autonomy and investor protection, as was recognized in prior decisions of the Seventh Circuit,[12] the Second Circuit[13] and numerous district courts, including those in the Second Circuit.[14] In addition, the CFTC continues to advocate adoption of this standard in analagous circumstances. Brief of Commodity Futures Trading Commission, *supra*.

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[12] *Hochfelder v. Midwest Stock Exchange*, 503 F.2d 364, 368 and n.2 (7th Cir.) (construing Section 6 of the Securities Exchange Act of 1934), *cert. denied*, 419 U.S. 875 (1974); *Deaktor v. L.D. Schreiber & Co.*, 479 F.2d 529, 530, 534 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973).

[13] *Baird v. Franklin*, 141 F.2d 238 (2d Cir.) (construing Section 6 of the Securities Exchange Act of 1934), *cert. denied*, 323 U.S. 737 (1944).

[14] *Strobl v. New York Mercantile Exchange*, 561 F. Supp. 379, 382-84 (S.D.N.Y. 1983); *Gordon v. Hunt*, 558 F. Supp. 122, 124 (S.D.N.Y. 1983); *Strax v. Commodity Exchange, Inc.*, 524 F. Supp. 936, 943 (S.D.N.Y. 1981); *Pollock v. Citrus Associates of the New York Cotton Exchange*, 512 F. Supp. 711, 712, 713 (S.D.N.Y. 1981); *P.J. Taggares Co. v. New York Mercantile Exchange*, 476 F. Supp. 72, 78 (S.D.N.Y. 1979); *Smith v. Groover*, 468 F. Supp. 105, 118 (N.D. Ill. 1979); *Seligson v. New York Produce Exchange*, 378 F. Supp. 1076, 1084-85 (S.D.N.Y. 1974), *aff'd on other grounds sub nom. Miller v. New York Produce Exchange*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977); *Marbury Management, Inc. v. Alfred Kohn, Wood, Walker & Co.*, 373 F. Supp. 140, 142-43 (S.D.N.Y. 1974).

Petitioner submits that this is the standard of bad faith that should control here. This case does not challenge a particular response to a manipulation chosen by the Exchange from among competing solutions. Rather, Apex attacked the exchange defendants' failure to enforce non-discretionary delivery rules and their failure to take any of a number of authorized responses to an admittedly unlawful manipulation. If Exchange rules and procedures had been enforced, the manipulation should have been brought swiftly to an end. Indeed, the exchange defendants could have defused the manipulation by adopting any of a number of alternatives that the Exchange had previously identified as appropriate responses to a short squeeze. Instead, the exchange defendants' self-proclaimed "jawboning," complete with threats of default penalties, succeeded in aiding the conspiracy by forcing Petitioner to buy its way out of the manipulated market. Petitioner respectfully submits that the exchange defendants abdicated their regulatory responsibilities and thereby are guilty of bad faith. This Petition should be granted to resolve this important question.

II. The Second Question Presented Involves A Misapplication Of This Court's Decision In *Monsanto*, Resulting In The Unconstitutional Abrogation Of The Seventh Amendment Right To A Jury Trial

The Court of Appeals found that Apex's evidence was sufficient to submit to a jury the question whether certain long defendants – Northeast, Global and Belcher – entered into an actionable antitrust and commodities conspiracy (A3-26). In deciding this issue, the court applied *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), which require, respectively, that the conspiracy at issue be "plausible" and that there be sufficient evidence "tending to exclude" the possibility that the defendants were acting independently (*Id.*).

Having found sufficient evidence of a conspiracy among these long defendants, the court proceeded to consider whether additional defendants could be "linked" to the scheme as participants.

It is commonly held that "once a conspiracy is shown, only slight evidence is needed to link another defendant with it." *United States v. Wilkinson*, 754 F.2d 1427, 1436 (2d Cir.), *cert. denied*, 472 U.S. 1019 (1985), *quoting United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974). [15] This standard has been applied in criminal actions where the burden of proof is substantially higher than in civil cases. *Id.*; see note 15 *supra*. It has, likewise, been held applicable to an antitrust conspiracy prosecution. *Morton Salt Company v. United States*, 235 F.2d 573, 580 (10th Cir. 1956) ("[O]nce a conspiracy is proved a relatively small amount of evidence connecting a particular defendant with that conspiracy will suffice to sustain a guilty verdict.").

The common understanding of the slight evidence standard is:

> Once there is satisfactory proof that a conspiracy has been formed, the question of a particular defendant's connection with it may be merely a matter of whether the stick fits so naturally into position in the fagot as to convince that it is part of it. It is therefore possible for the circumstances on an individual defendant's participation in an established conspiracy to become substantial from their weight in position and context, though in abstraction they may seem only slight.

Phelps v. United States, 160 F.2d 858, 867-68 (8th Cir. 1947), *cert. denied*, 334 U.S. 860 (1948).[16]

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[15] *See also United States v. Williams*, 737 F.2d 594 (7th Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); *Kentroti v. Frontier Airlines, Inc.*, 585 F.2d 967 (10th Cir. 1978); *United States v. Turner*, 528 F.2d 143 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975).

[16] *See also United States v. Davis*, 623 F.2d 188, 191 (1st Cir. 1980); *United States v. Medina-Herrera*, 606 F.2d 770, 773 (7th Cir. 1979), *cert. denied*, 446 U.S. 964 (1980); *Cave v. United States*, 390 F.2d 58, 70 (8th Cir.), *cert. denied*, 392 U.S. 906 (1968).

Despite its statement that only "slight evidence" was necessary to connect the remaining long defendants to the conspiracy at issue (A28), the Court of Appeals failed to apply the standard. For example, in assessing the evidence presented against defendant DiMauro, the court stated:

> One possible explanation for this activity is that DiMauro was soliciting Tipco to join a conspiracy. The problem with this approach is that it assumes that there was a conspiracy of which DiMauro was a member . . . . [W]e are therefore unable to conclude that the [particular evidence in question] *tends to exclude* the possibility that DiMauro was simply trying to solicit business for his brokerage firm.

(A28 emphasis added).

This reasoning is entirely inconsistent with the very standard of proof the Court of Appeals purported to apply. The essence of the "slight evidence" standard is that a conspiracy already has been established. *See, e.g., United States v. Wilkinson, supra.* Upon that predicate, only slight evidence is necessary to connect additional participants to the conspiracy. Instead of using its threshold determination that a triable issue of conspiracy had been established in this case, the Court of Appeals erroneously deemed it necessary to find multiple, independent conspiracies as to each alleged co-conspirator – each such conspiracy satisfying the "tends to exclude" evidentiary requirement of *Monsanto.*

Petitioner submits that – given evidence sufficient to raise a triable issue of conspiracy among other defendants – it is for a jury to consider whether the conduct of DiMauro, his companies and his clients (paralleling the unusual nominations of Global, Northeast and Belcher and their insistence thereon) is most naturally explained as reflecting their participation in the conspiracy, given their motive (to "get Apex") and opportunity (frequent inter-firm communications during the relevant time frame) to join the conspiracy. As set forth above, the Court of Appeals rejected this argument because it erroneously continued

to apply the *Monsanto* standards to each separate defendant and thus substituted its judgment for that of a jury.

This error is most clearly evidenced by the Court of Appeals' treatment of evidence that Stinnes and Eastern profited from their carefully timed nominations after discussion with DiMauro. The court rejected this evidence "for essentially the reasons stated by the district court" (A26). However, the District Court ruled that there was no probative evidence of conspiracy. Consequently, it is impossible for that court to have applied the slight evidence standard. Rather, the District Court applied the *Monsanto* standard to the evidence before it.[17]

In sum, the Court of Appeals failed to consider the evidence against the other defendants against the backdrop of conspiracy. This was contrary to decisions in many circuits, including the Second Circuit, that clearly recognize and have employed the "slight evidence" standard in conspiracy cases. See pp. 21-22 *supra*. Moreover, it is a wholly unsupportable extension of this Court's decision in the *Monsanto* case. The "slight evidence" standard would be devoid of meaning if, as the Court of Appeals required, evidence sufficient to establish an independent conspiracy under the *Monsanto* test was required to satisfy it. Indeed, as interpreted below, *Monsanto* would become a vehicle for the wholesale abrogation of an antitrust plaintiff's constitutional right to a jury trial.

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[17] The District Court's expression of this standard was as follows:

> The Supreme Court's recent opinions, particularly those in *Monsanto* and *Matsushita*, signal a marked change from the reticence to grant summary judgment of *Poller* [*v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962)], a change spurred, perhaps, by the onslaught of massive antitrust litigation over the last twenty years and the attendant stress on the administration of justice. It is also significant that *Matsushita*, in elucidating a standard which requires the district judge to carefully parse inferences before sending an antitrust case to a jury, does not mention *Poller*, a silence which speaks volumes about the Court's intentions.

(A57-58).

This Court has, in recent years, decided several cases which have resulted in increased use of summary judgment as a device to resolve disputes. These cases, applied in the appropriate context, insure that courts are not burdened with issues on which a plaintiff cannot possibly present a material issue of fact. However, many of these same cases make clear that the primary focus remains, as required under the Seventh Amendment, that summary judgment not deprive litigants of their right to trial by jury.[18]

In this case, the Court of Appeals misapprehended the meaning of these decisions and, in particular, misapplied the *Monsanto* decision. In so doing, it improperly removed from the province of the jury issues for which there is sufficient evidence to support a verdict for Apex. Accordingly, this Court should grant the Petition, clarify the scope of its decision in *Monsanto* and reemphasize this Court's recognition that summary judgment, unless carefully applied, will deprive litigants of their right to a jury trial, which Petitioner submits occurred here.

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[18] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 574, ____, 106 S. Ct. 2505, 2513 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); *Monsanto*, 465 U.S. at 767 n. 11, n. 12 ("The interpretation of these documents and the testimony surrounding them properly was left to the jury . . . . The choice between two reasonable interpretations of the testimony properly was left for the jury."), 465 U.S. at 768 n. 13 ("Monsanto's contrary evidence has force, but we agree with the courts below that it was insufficient to take the issue from the jury.").

Conclusion

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 737—August Term, 1986

(Argued: February 6, 1987 Decided: June 17, 1987)

Docket No. 86-7898

APEX OIL COMPANY,

Plaintiff-Appellant,

— v. —

JOSEPH DIMAURO, TRIAD PETROLEUM, INC., TIC COMMODITIES, INC., COASTAL CORPORATION, COASTAL STATES MARKETING, INC., BELCHER OIL COMPANY, THE BELCHER COMPANY OF NEW YORK, INC., BELCHER NEW ENGLAND, INC., BELCHER NEW JERSEY, INC., STINNES CORPORATION, STINNES INTER-OIL, INC., EASTERN OF NEW JERSEY, INC., NORTHEAST PETROLEUM INDUSTRIES, INC., NORTHEAST PETROLEUM CORPORATION, GEORGE E. WARREN CORPORATION, NEW YORK MERCANTILE EXCHANGE and JULIAN RABER,

Defendants-Appellees.

Before:

PIERCE and ALTIMARI, *Circuit Judges*, and SPRIZZO, *District Judge.**

Appeal from an order of the United States District Court for the Southern District of New York (Walker, *J.*) which granted appellees' motions for summary judgment in this complex antitrust case.

Affirmed in part, reversed in part and remanded.

RICHARD J. WIENER, ESQ., New York, New York (Pamela Rogers Chepiga, Jeffrey Q. Smith, Robert D. Rippe, Jr., Cadwalader, Wickersham & Taft, New York, New York, of counsel), *for Plaintiff-Appellant.*

MARTIN I. KAMINSKY, ESQ., New York, New York (Edward T. McDermott, Pollock & Kaminsky, New York, New York, of counsel), *for Defendants-Appellees Joseph DiMauro, Triad Petroleum, Inc., and TIC Commodities, Inc.*

MICHAELLESCH, ESQ., New York, New York (Adam B. Gilbert, Yee Wah Chen, Shea & Gould, New York, New York, of counsel),

*Hon. John E. Sprizzo, Judge, United States District Court for the Southern District of New York, sitting by designation.

for Defendants-Appellees The Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New England, Inc., and Belcher New Jersey, Inc.

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(Donald E. Egan, Lee Ann Watson, James E. Hanlon, Jr., Katten, Muchin, Zavis, Pearl, Greenberger & Galler, Chicago, Illinois, Christopher H. Lunding, Mitchell A. Lowenthal, Cleary, Gottlieb, Steen & Hamilton, New York, New York, of counsel), *for Defendants-Appellees Stinnes Corporation and Stinnes Interoil, Inc.*

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(Julius Berman, Phillip A. Geraci, Kaye, Scholer, Fierman, Hays & Handler, New York, New York, of counsel), *for Defendant-Appellee Julian Raber.*

PIERCE, *Circuit Judge*:

In this appeal we are called upon to review a grant of summary judgment in a complex antitrust conspiracy case. This litigation arises out of the circumstances surrounding the settling of February 1982 futures contracts for No. 2 home heating oil. Simply stated, plaintiff-appellant Apex Oil Company ("Apex") alleges that defendants-appellees, which include competing oil companies, a broker, the New York Mercantile Exchange (the "Exchange"), and an officer of the Exchange named Julian Raber, conspired to force Apex to deliver much of the oil it had agreed to deliver in February 1982 in the first three delivery days of that month at one delivery site. Apex alleged that this behavior made it impractical or impossible for Apex to deliver on time and forced Apex to pay premium prices to other oil companies, including defen-

dants, to obtain oil for delivery to defendants in order to avoid a default.

I. INTRODUCTION

Since this action centers upon a series of events surrounding the futures market for No. 2 heating oil for February 1982, it is helpful to outline the workings of the commodities futures market.

In brief, a commodity futures contract entitles the buyer of the contract (the "long") to purchase from the seller of the contract (the "short") a set quantity of some commodity at a set date in the future. Typically, all of the terms of the contract, except price, are standardized under the rules of an exchange. The price is negotiated on the floor of the exchange.

This case concerns futures contracts for No. 2 heating oil sold on the Exchange. On the Exchange, one futures contract for No. 2 oil consists of a contract to deliver 1000 barrels (42,000 gallons) of oil in New York Harbor at a set price during some future month.

Most contracts, however, never result in actual delivery since the market is used by many investors for speculation. Speculation is made possible by allowing holders of long or short "positions" to "liquidate" those positions by purchasing or selling the necessary contracts. For example, a holder of short contracts who does not wish to deliver oil may buy a number of long contracts equal to the number of short contracts he or she holds. Similarly, a long who does not wish to take delivery of the oil may enter into short contracts equal in number to the number of long contracts held. The speculator makes a profit or suffers a loss based on the differences in the prices paid for the long and short contracts.

Many actors take part in the market for No. 2 heating oil futures. A futures commission merchant or broker executes the desires of the actual buyers or sellers of contracts by requesting a member of the Exchange ("clearing member") to enter into the transaction through a floor broker on the floor of the Exchange. The Exchange functions as a "clearing house," acting as a buyer to all sellers and a seller to all buyers thereby enabling an investor who wishes to buy or sell a contract to find a partner.

When trading is closed for contracts for a particular month, the Exchange determines which persons hold long positions and which persons hold short positions by offsetting each trader's long contracts and short contracts. The Exchange then matches the longs with the shorts for the purpose of delivery. Under rules discussed below, the matched parties work out the time, place and method of delivery. Delivery may still be avoided by means of an "exchange futures for product" transaction ("EFP"). In an EFP, the parties agree to supersede the futures contract with a new contract to deliver oil on the cash ("wet") market. If the holder of a short position defaults, i.e., fails to deliver timely, the Exchange rules provide for fines and other sanctions.

II. BACKGROUND

In light of the complexity and mass of material presented by the parties herein, we briefly summarize what appear to us to be undisputed facts concerning the subject February 1982 No. 2 heating oil contracts.

The rules of the Exchange provided that any February contracts not liquidated by Friday, January 29, 1982—the close of trading for such contracts—would be matched, long with short, for the purpose of delivery (or EFP). At

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the close of trading, Apex was short 4,378 contracts. In other words, Apex had agreed to deliver 4,378 contracts (183,876,000 gallons) of oil in February 1982. The total number of outstanding contracts designated for delivery by all persons holding short positions, including Apex, was 4,906.

Of the 4,906 contracts open at the close of trading, 1,945 were held by a number of oil companies and their affiliates who were named as defendants herein[1] (the "long defendants"):

Northeast	748
Global	362
Belcher	315
Stinnes	300
Warren	170
Eastern	50

[1]The long defendants are:

1. Northeast Petroleum Corporation and Northeast Petroleum Industries, Inc. (collectively "Northeast"). Apex and Northeast settled this case after argument and this appeal was dismissed as to Northeast in May 1987.
2. Global Petroleum Corporation ("Global"). Pursuant to a stipulation and order filed on November 22, 1983, this action was "discontinued" as to Global with prejudice.
3. Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New England, Inc., and Belcher New Jersey, Inc. (collectively "Belcher").
4. Stinnes Corporation and Stinnes Interoil, Inc. (collectively "Stinnes").
5. George E. Warren Corporation ("Warren").
6. Eastern of New Jersey, Inc. ("Eastern").

The other defendants include:

1. Joseph DiMauro, a broker in the commodities futures market and the cash ("wet") market for No. 2 heating oil.
2. Triad Petroleum, Inc. ("Triad"), DiMauro's brokerage firm for transactions on the wet market.
3. TIC Commodities, Inc. ("TIC"), Dimauro's brokerage firm for transactions on the futures market.
4. The New York Mercantile Exchange (the "Exchange") and Julian Raber ("Raber"), the vice chairman of the Exchange (collectively the "Exchange defendants").

As required by Exchange rules, on February 1, 1982, Apex selected a delivery site through its broker and clearing member Goldman Sachs & Co. ("Goldman"). For 4,281 of its 4,378 contracts, it selected GATX terminal in Carteret, New Jersey, as the delivery site. Apex designated B.P. terminal at Tremley Point, New Jersey, as the delivery site for the remaining contracts. On the same day, also pursuant to Exchange rules, each long defendant submitted "Notice of Intention to Accept Petroleum Products Futures." The clearing house then matched up longs and shorts for delivery. All of the open long positions held by the long defendants, except for fifteen contracts to be delivered to Warren, were designated by the Exchange for delivery by Apex.

The Exchange rules then required each long to nominate a delivery date and method by 4:30 p.m. on February 5. Deliveries could be requested by pipeline, intra-facility transfer, inter-facility transfer, inventory (also known as book) transfer, tanker, barge or truck. Inventory transfer entails transfer of title of oil without actually moving or delivering it.

The rules then in effect stated that "[t]he buyer shall give written delivery or loading instructions," that "[a]ll deliveries must be completed after the fifth business day and before the last business day of the delivery month," and that in the case of barge or tanker delivery, "[t]he seller must supply the product as soon as the barge or tanker reports readiness to load," or in the case of on-shore delivery, "as soon as the buyer reports the transfer facility or truck is ready to accept the product." Herein, the first day for which the long defendants could demand delivery was February 6.

Prior to February 1982, the nominations by holders of long positions typically were spread throughout the

month. Moreover, it was not unusual for long and short parties to be somewhat flexible in the actual timing and location of delivery. For example, in December 1981 and January 1982, the nominations of the long defendants were spread fairly evenly throughout each month. The actual delivery dates differed from the nominated dates for roughly two-thirds of the nominations. The actual delivery method was changed in two-thirds of the nominations. The actual location for delivery differed in nearly one-third of the nominations. Thus, although the rules apparently allowed longs to rigidly demand delivery at a particular time and place, in practice the longs were not always inflexible.

According to Apex, this pattern was broken in February 1982. Apex alleges that the long defendants, aided by DiMauro, a broker, and by the Exchange and Raber, conspired to nominate an inordinate number of their contracts for the first three delivery days of February. There is no dispute that the defendants actually did nominate a large number of contracts for the first few days. Indeed, in over 75% of the long defendants' 1,945 nominations, delivery was demanded for one of the first three delivery days. Significantly, fewer than 25% of long positions held by non-defendants were nominated for the first three days. Further, our calculations indicate that while over half of the contracts held by defendants were nominated for the first day of delivery, only about 10% of contracts held by non-defendants were nominated for the first day. Apex alleges, and the defendants deny, that a conspiracy among the defendants was responsible for this nomination pattern.

There is evidence that on February 3, a broker representing several long interests passed along a rumor on the

Exchange floor that Apex would not be able to make delivery. That afternoon, the Exchange Control Committee convened for the purpose of resolving any market problem. Apparently, the broker repeated his statement regarding the possibility of an Apex default and also stated that "one or two" of his customers were "out to get Apex." The record indicates that similar rumors circulated among a number of other brokers and oil companies.

On the next day, February 4, Apex's broker, Goldman, represented to the Exchange Control Committee that Apex would not default, claiming that it expected to receive 750,000 barrels from Amoco and that it expected to have another 400,000 barrels available at GATX. However, on February 5, Goldman told the committee that Apex no longer expected to have the oil available at GATX for deliveries nominated for February 6, 7 or 8. Apex apparently only had available approximately 30,000 barrels of No. 2 oil at GATX on February 5.

Meanwhile, on February 4 and 5 the Exchange Control Committee asked several clearing members to suggest that their customers holding long positions agree to change delivery dates and sites. Apex alleges that its own requests to change delivery dates, methods or sites were either ignored or rejected by the long defendants. The long defendants do not appear to contest this allegation. Apex further alleges that this inflexibility was the result of a conspiracy among the defendants to "squeeze" Apex by forcing it to deliver an enormous amount of oil on short notice. As a result of this inflexibility, Apex claims that it was forced to purchase oil from the long defendants at inflated prices in order to meet its delivery obligations. Indeed, there is evidence that while the closing price for

February contracts was 89.7¢ per gallon, Apex paid prices as high as 97.5¢ per gallon to several long defendants for oil that was immediately delivered back to the long defendants to satisfy Apex's delivery obligations. These purchases of oil enabled Apex to avoid a default.

III. THE CLAIMS ALLEGED

The gravamen of Apex's claims is that the defendants conspired to "squeeze" Apex: the long defendants, DiMauro, TIC, and Triad did so by manipulating the market; Raber and the Exchange by assisting or failing to prevent the other defendants from manipulating the market. The amended complaint asserts eight "claims for relief," which can be placed into four categories.

1. *Antitrust Conspiracy.* Apex alleges four Sherman Act claims; treble damages are requested. Three claims allege violations of section 1 of the Act and one alleges a violation of section 2. *See* 15 U.S.C. §§ 1, 2.

The first claim asserts that the long defendants and the exchange defendants conspired to nominate for early delivery in violation of section 1 of the Act. The early nominations allegedly enabled the long defendants to "manipulate, raise, maintain, stabilize and/or fix the price of No. 2 Heating Oil" by creating an "artificial shortage." Amended Complaint ¶¶ 46-52; *see* 15 U.S.C. § 1.

The second claim alleges that the long defendants conspired to refuse to deal with Apex by refusing to sell No. 2 oil to Apex, thereby weakening Apex's position as a competitor and creating an artificially high price for the oil. Amended Complaint ¶¶ 53-59; *see* 15 U.S.C. § 1.

The third claim asserts that the long defendants conspired to prevent other sources of No. 2 oil from supply-

ing it to Apex, thereby artificially raising the price for the oil. Amended Complaint ¶¶ 60-64; *see* 15 U.S.C. § 1.

The fourth claim alleges that the long defendants conspired to monopolize the wet market for No. 2 oil available for delivery in New York Harbor during early February 1982, thereby causing Apex to pay artificially high prices for such oil. Complaint ¶¶ 65-69; *see* 15 U.S.C. § 2.

2. *Commodities Manipulation.* The fifth claim in the amended complaint alleges that the long defendants violated sections 9(b) and 13(a) of the Commodity Exchange Act ("CEA") by manipulating the price of oil and that all the defendants violated the CEA by spreading false reports about Apex. Amended Complaint ¶¶ 70-79; *see* 7 U.S.C. §§ 13(b), 13c(a). This claim apparently has been abandoned with respect to the Exchange defendants.

3. *Failure to Regulate.* The seventh claim in the amended complaint asserts that the exchange defendants failed to regulate properly the activities of brokers, traders and others with respect to the trading and delivery of oil during the period in question. thus violating the Commodity Exchange Act and regulations thereunder. Amended Complaint ¶¶ 86-91; *see* 7 U.S.C. §§ 7a(8), 7(d).

4. *Fraud.* The sixth claim alleges fraud under the Commodity Exchange Act, *see* 7 U.S.C. §§ 6b, 13c(a), and the eighth claim alleges common law fraud by the long defendants. Amended Complaint ¶¶ 80-85, 92-97.

Discovery on all the claims having been completed, all the defendants moved for summary judgment dismissing all the claims. The district court granted the motions and entered judgment dismissing the amended complaint. *See*

Apex Oil Co. v. DiMauro, 641 F. Supp. 1246 (S.D.N.Y. 1986).

We affirm in part, reverse in part and remand.

IV. DISCUSSION

A. The Antitrust Claims

The principal issue in this appeal is whether Apex has produced enough evidence in support of the claimed conspiracy to survive defendants' motions for summary judgment. These motions with respect to the antitrust claims were aimed only at this issue and the district court's grant of the motions was founded upon the district court's perception of a lack of evidence of a conspiracy. While we agree with the district court that, despite the great mass of evidence presented by Apex, the evidence of conspiracy is insufficient as to most of the defendants, we conclude that sufficient evidence has been presented for the case to proceed as to one defendant.

A motion for summary judgment shall be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Herein, we focus primarily on the first part of the test: whether there is an issue of fact as to the existence of a conspiracy.

The movant bears the initial burden of demonstrating "the absence of a genuine issue as to any material fact." *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). This may consist simply of pointing out that the plaintiff has failed to present any evidence to establish a necessary element of the cause of action. *See Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53 (1986). In response, the non-moving party must then "set forth specific facts

showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see Celotex Corp.*, 106 S. Ct. at 2552 & n. 3; *Adickes*, 398 U.S. at 159-61. While the non-moving party must show more than a "metaphysical doubt" as to material facts, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986), all inferences must be drawn in favor of the non-moving party. *Id.* at 1356-57. However, the Supreme Court has stated that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Id.* at 1357.

Specifically, "conduct as consistent with permissible conduct as with [an] illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.*; *see Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S 752, 764 (1984). There must be some evidence that "tends to exclude the possibility that the [defendants] were acting independently." *Monsanto*, 465 U.S. at 764. Thus, evidence of parallel conduct alone cannot suffice to prove an antitrust conspiracy. A plaintiff "should present direct or circumstantial evidence that reasonably tends to prove that the [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Id.* (quoting *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)); *see also H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 459 U.S. 880 (1982). As stated by this court, "[a]t a minimum, . . . 'the circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.' " *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 793 (2d Cir. 1987) (quoting *Michelman v. Clark-Schwebel Fiber Glass Corp.*,

534 F.2d 1036, 1043 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976)).

We must note however that while summary judgment is a valuable means for avoiding unnecessary trials, and recent Supreme Court as well as Second Circuit cases have tended to encourage its use in complex cases such as this one, *see, e.g., Celotex Corp.*, 106 S. Ct. at 2555; *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986); *Matsushita, supra*; *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1570 (1987); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 250-51 (2d Cir. 1985), it should not be regarded as a substitute for trial. Thus, while the Supreme Court has indicated that trial courts should draw only reasonable inferences in favor of the non-moving party viewing the evidence as a whole, *see Matsushita*, 106 S. Ct. at 1357; *see also International Distribution Centers*, 812 F.2d at 793-94, and while some assessing of the evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible, it is evident that the question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at a trial.

In *Matsushita* the plaintiffs had alleged that various Japanese television manufacturers were engaged in a predatory pricing scheme, financed by the charging of higher than competitive prices in Japan, designed to put American companies out of business. In that case, the Supreme Court stated that summary judgment dismissing the action was appropriate since predatory pricing schemes are inherently unlikely and since there was no sign of the alleged goal of such a scheme ever coming within reach after many years of its alleged operation.

Thus, since the scheme was not "plausible," the Court stated that the jury should not be permitted to infer the existence of a conspiracy from evidence of higher than competitive prices in Japan since to do so could deter pro-competitive conduct, i.e., the setting of low prices in the United States. *Id.* at 1360; *see also Monsanto,* 465 U.S. at 762-64. If the scheme alleged is implausible, a conspiracy must be proved by strong direct or strong circumstantial evidence, and the implausibility of a scheme will reduce the range of inferences that may permissibly be drawn from ambiguous evidence. *See Matsushita,* 106 S. Ct. at 1360-62.

It is worth noting that the conspiracy alleged herein seems plausible, as evidenced by the apparent ability of some defendants to sell oil to Apex at prices significantly over market. Our task herein is to discern whether on the evidence presented it could reasonably be concluded that the higher prices came about as a result of a conspiracy, rather than through independent action of the defendants.

We also think it worth noting that in the *Matsushita* and *Monsanto* cases, the types of conspiracies alleged were more susceptible of direct proof since they concerned long-term complex relationships among competitors. *See* Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach,* 21 Stan. L. Rev. 1562, 1569-75 (1969) (discussing difficulty of maintaining cartel of many firms and probable need for explicit agreement); *see also Gainesville Utilities Department v. Florida Power & Light Co.,* 573 F.2d 292, 303 (5th Cir.), *cert. denied,* 439 U.S. 966 (1978); F. Sherer, Industrial Market Structure and Economic Performance 199-200 (2d ed. 1980). In a case where the alleged scheme is short-term and relatively simple in operation, we must as a practical matter accept that

the best proof available most often will only tend to show the existence of an informal, perhaps even tacit, rather than explicit, agreement. Therefore, we carefully examine the conduct and communications of the defendants in order to determine whether it evidences an agreement. *See Gainesville Utilities Department, supra* (citing Posner, *supra,* at 1562).

1. *Parallel Conduct*

Much of the evidence in this case concerns the alleged parallel conduct of the defendants. Parallel conduct can be probative evidence bearing on the issue of whether there is an antitrust conspiracy. However, parallel conduct alone will not suffice as evidence of such a conspiracy, even if the defendants "knew the other defendant companies were doing likewise." *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.,* 513 F.2d 102, 110 (2d Cir. 1975). More must be shown.

Since mere parallel behavior can be consistent with independent conduct, courts have held that a plaintiff must show the existence of additional circumstances, often referred to as "plus" factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy. *See id.*; *In re Plywood Antitrust Litigation,* 655 F.2d 627, 633-37 (5th Cir. 1981), *cert. dismissed,* 462 U.S. 1125 (1983). Such circumstances might include a common motive to conspire or a high level of interfirm communications. *See, e.g., id.* at 633 (interfirm communications); *Ambook Enterprises v. Time Inc.,* 612 F.2d 604, 616 (2d Cir. 1979) (common motive to conspire), *cert. dismissed,* 448 U.S. 914 (1980). *See generally* P. Areeda, Antitrust Analysis 371-82 (3d ed. 1981). However, such plus factors may not necessarily lead to an inference of conspiracy. For example, such fac-

tors in a particular case could lead to an equally plausible inference of mere interdependent behavior, i.e., actions taken by market actors who are aware of and anticipate similar actions taken by competitors, but which fall short of a tacit agreement. *See id.* at 374-75. In such a case, a court might find it difficult to hold that the parallel acts "tend to exclude the possibility" of independent action.

As discussed below, see Parts IV.A.2 to IV.A.5 *infra*, while Apex points to evidence indicating that the long defendants may have been motivated by a desire to make inordinate profits, or to "get" Apex, this evidence of motivation creates an equally valid inference of independent action. Apex also points to evidence of a number of communications among the defendants. However, aside from the particular communications discussed below, see Part IV.A.2 *infra*, for the reasons stated by the district court, we believe that inferring a conspiracy from the existence of these communications would amount to speculation under the circumstances herein. *See* 641 F. Supp. at 1266-69. Accordingly, we believe that in this case Apex must show more.

Apex presents evidence which it believes shows that the parallel acts were "against the apparent individual economic self-interest of the alleged conspirators." *Modern Home Institute*, 513 F.2d at 111. Such a showing, if successful, might tend to exclude the possibility of independent parallel behavior. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *see also Matsushita, supra. See generally* 6 P. Areeda, Antitrust Law ¶¶ 1415, 1434, at 84-93, 213-21 (1986).

Apex argues that it made no economic sense for defendants individually to nominate early. However, the most

court deciding whether to grant summary judgment should not view each piece of evidence in a vacuum. Seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place. Evidence can take on added meaning when viewed in context with all the circumstances surrounding a dispute. Thus, while we must carefully determine what inferences reasonably may be drawn from each piece of evidence, we must make this determination in light of all of the evidence proffered by Apex.

2. *Communications Among the Defendants*

Perhaps the strongest evidence of a conspiracy offered by Apex is contained in a notebook kept by Dennis Denihan of Northeast memorializing a telephone conversation on February 3 between Fred Slifka, an officer of Global, and Don Oliver at Northeast. The entry in the notebook read:

> *DAO*
> Re Merc Nominations
> (1) All nominations in writing
> (2) If not accepted, NPC [Northeast] to demand $100/contract/day penalty for 5 days
> At end of five days window NPC to demand 10 pct penalty + oil plus go to court
> (3) NPC to go to newspaper and expose exchange
> (4) All loadings must be GATX
> [Portion obliterated].

Under the circumstances herein, we believe a reasonable inference could be drawn that this notebook entry evidences an agreement between Slifka of Global and Oliver of Northeast to take the actions set forth in it. The district

court suggested that since Apex itself picked GATX as the place of delivery, "it is more likely" that the conversation was a natural one between traders faced with the possibility of an Apex default on deliveries; that it was merely a discussion of shared concerns. *See* 641 F. Supp. at 1267. In other words, since those in the market were aware that Apex might well default, it was reasonable for competitors to discuss this possibility and also possible responses to be taken in order to ensure delivery of the oil.

However, while Apex itself initially chose GATX as the delivery location, there was some evidence indicating that Apex had not in the past been held to its initial selection of a delivery site. Moreover, it seems that if these two parties truly were concerned primarily with early delivery of the oil, a better way to ensure delivery might have been to show some flexibility as to the mode and place of delivery. Instead, the notebook entry seems to suggest that Northeast and Global may have agreed to insist on delivery of the oil at GATX. The long defendants cite evidence suggesting they feared loss of priority if they showed flexibility. However, this merely represents evidence disputing the inference which can be drawn from the notebook entry.

Moreover, the district court seems to have accepted the long defendants' assertion that since the price of No. 2 oil was falling at the time the nominations were made, no issue of fact could exist as to the motivation behind the early nominations. As this argument runs, it was sensible to accept the oil early so that a higher price could be charged on resale. This would tend to show that the notebook entries merely evidence an innocent conversation about how to achieve that end.

We cannot agree with this characterization of the evidence. First, assuming prices were falling, it was not inevi-

table that early nomination would be advantageous. For example, it would not have made sense to incur storage costs if fairly rapid resale was not feasible. A table compiled by the long defendants indicates that for *all* long positions in February 1982 No. 2 oil contracts, defendant and non-defendant, only about 30% of all nominations specified the first two days of the delivery period. Our calculations, based upon apparently undisputed compilations, submitted by Apex, of the number of nominations for each day made by each long defendant, indicate that over 60% of the long defendants' nominations were for the first two days (over 75% for the first three days); and approximately 65% of Global's nominations were for the first two days (100% in the first three days). While only about 10% of Northeast's nominations were for the first two days, over 55% were for the first three days. The non-defendant longs nominated only 15% of their contracts for delivery for the first two days (19% in the first three days). In fact, it appears that the non-defendant longs nominated at most 23% of their Apex contracts for the first three days. It therefore seems clear that not all holders of long positions in oil contracts in a climate of falling prices saw fit to take delivery early, even with respect to those contracts to be delivered by Apex. Indeed, some evidence indicates that in the two months prior to February 1982, No. 2 oil prices may have been dropping, albeit not as rapidly. In those months, very few contracts were nominated early by holders of long positions.

We see no conflict between our view here that evidence of falling prices does not necessarily indicate that early delivery was in the interest of every holder of a long position, and our discussion above in which we stated that demanding early delivery was not automatically suspect.

We believe that the demand of early delivery, by itself, creates no dominant inference.

However, in light of the incriminating nature of the notes regarding the telephone conversation, since we must draw reasonable inferences in favor of Apex, we conclude that the finder of fact should decide whether the denial of conspiracy by the defendants should be accepted. We do not reverse as to Global and Northeast since the claims against them have been settled. See note 1, *supra*. However, this discussion is relevant to interpreting additional communications among certain defendants which are discussed below.

We next consider several entries made in the notebook of William Berberich of Belcher on February 1, 1982, prior to the nominations by the long defendants. In that notebook, the name of Don Oliver, a trader at Northeast, appears. An arrow is drawn from the name to the notation, "*Losses.*" Under these notations there are additional notations that appear to relate to prices of No. 2 oil. Then there appears the following: "Demand *delivery*" (emphasis in original), "Look for Default" and "Merc—EFP." Several pages later, in another notation for February 1, the notebook reads, "Sat. demand 12:01 Sat. [February 6] AM"; and in notations for February 2 appear the words, "promote crunch" and "press for default."

Apex asks us to infer from this that Berberich spoke to Oliver on February 1 and agreed to "demand *delivery*" and thereby "press for default" on the part of Apex. Apex offers no other evidence indicating that the conversation ever took place. Looking at this evidence alone, we agree with the defendants and the district court that inferring that a conversation took place would amount to speculation. Proof of Belcher acting independently in an attempt

to create a short squeeze would not show a violation of the Sherman Act as alleged in the amended complaint.

Apex states that the suggested inference is a proper one because Belcher held a long position that was relatively small in comparison to the size of Apex. It is posited that Belcher alone could not have hoped to create a "crunch" and that therefore Belcher must have conspired to create the "crunch."

This reasoning ignores the undisputed evidence that Belcher was aware that Apex had relatively small amounts of No. 2 oil at GATX. On February 1, Apex actually had a deficit balance of oil at GATX. It also was widely known that Apex had a huge short position. Thus, it would not be unreasonable for officials at Belcher to assume that other holders of long positions might nominate some contracts early. One might also note that the 315 contracts held by Belcher amounts to 12,600,000 gallons, not an insignificant amount of oil.

At oral argument, counsel for Apex stated that it could have made delivery on all of its obligations were it not for the insistence on the use of GATX. Accordingly, we are asked by Apex to conclude that Belcher could not have reasonably expected to "squeeze" Apex with only 315 contracts. First, even if we assume this were so, it says nothing of the knowledge or beliefs of Belcher officials as to the matter. Apex in its brief cites a passage from a deposition of Paul Novelly, a principal of Apex. However, in that deposition Novelly merely stated that Apex had enough oil in its system "to deliver against the February contract[s]" "for the month." He did not testify that Apex could complete delivery the first three days of the delivery period. Thus, even if we were to assume that Belcher knew or believed that Apex was capable of delivering the

oil over the course of the month, it could have harbored a reasonable expectation that it could "squeeze" Apex by nominating its 315 contracts for the first minute of the delivery period. We therefore cannot draw an inference of conspiracy from this notebook entry alone.

However, Apex also points to another conversation, between Slifka of Global and Berberich of Belcher, which Apex argues supports an inference that Belcher took part in a conspiracy. On February 3, Slifka spoke to Berberich. Berberich admitted that the conversation took place, but stated that it was limited to whether Slifka thought there would be a default and to the fact that Warren held a long position. In his notebook for that day, Berberich entered Slifka's name and telephone number, followed by, "1) G.E. Warren .150. 2) Sent Wires and Want Immediate Answer. 3) Threatened WS [illegible]." Two pages later in the notebook, on the same date, an entry reads:

> —Penalty to start Fri.—
> —10% after 5 days—
> —oil at 5 days—
> —Bring suit against exchange
> —Restraining order to prevent any further trades on Merc.

Apex points out that the above entries in Berberich's notebook closely resemble the entries in Denihan's notes, discussed above, regarding a conversation between Slifka (Global) and Oliver (Northeast) on the same day. Apex also points out that " 'once a conspiracy is shown, only slight evidence is needed to link another defendant with it.' " *United States v. Wilkinson*, 754 F.2d 1427, 1436 (2d Cir.) (Mansfield, J.) (quoting *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974)), *cert. denied*, 472 U.S. 1019 (1985).

In our view, the similarity between the notes seems striking. If a finder of fact were to infer a conspiracy between Global and Northeast, a possibility we have concluded would be reasonable in light of Denihan's notebook entries, *see supra*, it could reasonably conclude in light of Berberich's notebook entries regarding the Slifka conversation that Belcher also participated, especially if we view the Slifka conversation in light of Berberich's notations made two days earlier (e.g., "promote crunch" and "press for default"). The long defendants point out that the conversation between Berberich and Slifka took place after Belcher had made its nominations, and argue that the entries merely refer to a discussion of whether there was going to be a default. However, the notes could more easily be interpreted as outlining the method of continuing the pressure that already had been placed on Apex. Thus, it reasonably could be inferred that the conversation consisted of more than mere speculation concerning Apex's ability to deliver. Accordingly, in light of all of the circumstances, including communications among the defendants and their parallel conduct, we must conclude that sufficient evidence has been produced from which a fact-finder could infer that Belcher, Global, and Northeast " 'had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.' " *International Distribution Centers*, 812 F.2d at 793 (quoting *Michelman*, 534 F.2d at 1043). We therefore reverse the dismissal of the antitrust claims as to Belcher.

Apex points to evidence of a series of additional conversations said to have occurred among the long defendants. Bearing in mind that evidence of the mere exchange of information by competitors cannot establish a conspiracy, *see Kreuzer v. American Academy of Perio-*

dontology, 735 F.2d 1479, 1487 (D.C. Cir. 1984), we have carefully considered the arguments of Apex with respect to these conversations. For essentially the reasons stated by the district court, *see* 641 F. Supp. at 1266-69, we conclude that inferring the existence of a conspiracy from the remaining conversations would amount to mere speculation.

3. *Apex's Other Evidence*

Apex presents a mass of other material that Apex characterizes as evidence of a conspiracy. We have carefully reviewed this evidence and, while we reverse and remand as to the antitrust claims against Belcher for the reasons stated above, and remain aware that " 'once a conspiracy is shown, only slight evidence is needed to link another defendant with it,' " *Wilkinson, supra*, since we do not find such a link, we conclude that affirmance of the grant of summary judgment is appropriate as to the remaining defendants.

a. The Activities of Sal DiMauro

Apex devotes much of its argument to discussing a number of activities engaged in by Sal DiMauro of Triad Petroleum, Inc. and TIC Commodities, Inc. We can find no permissible inference of conspiracy which can be drawn from any of this evidence.

Apex first points to an offer on February 1 by Sal DiMauro on behalf of Stinnes to sell Apex 300,000 barrels of oil for approximately 87¢ per gallon. This offer was withdrawn ten minutes later after Joseph DiMauro, also of Triad and TIC, spoke to the president of Stinnes. On February 2, Sal DiMauro offered Apex 300,000 barrels from Stinnes at 97 cents. And on February 3 Joseph

DiMauro offered Apex 1.5 million barrels at 93.5 cents. Apex wishes us to infer a conspiracy from this. However, Apex offers no evidence tending to show that this sequence was part of any agreement beyond one between Stinnes and its broker, DiMauro. Moreover, the fact that Stinnes used its broker to make the offers does not amount to an illegal conspiracy. A more likely inference from this evidence is that once the market became aware of Apex's delivery obligations, Stinnes and others, as rational sellers, raised the price of oil in order to take advantage of Apex's plight.

Apex also argues that Sal DiMauro invited one Jerry Schultz, a trader at Tipco Products, Inc. ("Tipco"), not a defendant, to participate in a short squeeze. Apex finds support for this proposition in the deposition of Schultz. However, a fair reading of the Schultz deposition leads to no such conclusion. Schultz had heard rumors of an impending short squeeze and discussed this with DiMauro. DiMauro asked Schultz "if [Tipco was] going to take delivery early." Schultz replied that Tipco had not yet decided and expressed concern about a lack of storage space. DiMauro suggested that delivery could be worked out. Schultz also asked how to go about nominating early. In response, DiMauro had a representative of TIC explain the nomination process to Schultz. Still unsure of the process, Schultz requested a telex explaining the necessary steps. TIC instead sent a telex to ContiCommodity Inc., Tipco's clearing member at the Exchange, which stated that Tipco planned to take delivery of all of its contracts on February 6. It also stated that "final delivery instructions [would] be communicated no later than February 5, 1982." Schultz testified that Tipco never authorized the sending of this telex.

One possible explanation for this activity is that DiMauro was soliciting Tipco to join a conspiracy. The problem with this approach is that it assumes that there was a conspiracy of which DiMauro was a member. Apex suggests that Schultz testified that he took the call to be an invitation to participate in a short squeeze along with certain other defendants. However, nothing in the transcript suggests that DiMauro was shown to be part of a conspiracy. Nor does it suggest with which long defendants DiMauro is supposed to have been conspiring. So, even if we assume that DiMauro had invited Tipco to take part in a squeeze, there is no indication that he did so pursuant to an agreement with any particular long defendants. We are therefore unable to conclude that the Schultz deposition "tends to exclude" the possibility that DiMauro was simply trying to solicit business for his brokerage firm. We conclude that this evidence does not give rise to any permissible inference of a conspiracy under the circumstances herein.

Next, Apex points to a conversation between Joseph DiMauro and Slifka of Global on February 4. True, the conversation was followed by the submission by TIC of a nomination on behalf of Stinnes of 300 contracts by inventory transfer at GATX on February 6. However, DiMauro was the broker for a number of the defendants, and it is a normal function for a broker to make transactions on behalf of a client. Further, given that there is no evidence of what was said during the conversation, we cannot conclude, in light of all of the circumstances, that a fact-finder should be allowed to infer that the conversation between DiMauro and Slifka concerned an agreement to squeeze Apex.

b. Statements of Certain Market Actors

Apex offers evidence of statements by certain persons that it claims suggest evidence of a conspiracy. This evidence adds little to what we already have discussed. The district court found that most of this evidence consists of inadmissible hearsay and that in any event none of the evidence tended to prove the existence of a conspiracy. We need not reach the hearsay question since the proffered evidence does not give rise to an inference of conspiracy.

For example, Apex argues that Tony Densieski, a trader for Texas Energy (not a defendant) informed the Vice-President of the Exchange that certain longs had invited Densieski to take advantage of Apex's position. However, Densieski never specified which longs had made this offer. We clearly cannot infer the participation on the part of any defendant based on such a generalized accusation.

The testimony of Jay Bernstein, an employee of Northville Carribean, is similarly unhelpful. Bernstein merely testified as to his understanding that there was a conspiracy among "other longs." These longs were unspecified, and Bernstein testified that he had no personal knowledge of any actions taken by the longs.

Similarly, while Julian Raber allegedly told Patricia Lyons of Apex that he was aware of "a conspiracy to 'squeeze the shorts,' " and referred to the actions of the longs as a "sting," the testimony concerning these statements lacked any indication of what facts Raber based his opinion on or even whether his opinion was based on anything at all other than rumor or speculation.

Upon examination of these and other alleged statements by market participants proffered by Apex in sup-

port of its conspiracy theory, we must conclude that taken either as a whole or individually, none of them creates an inference of a conspiracy among any additional named defendants.

c. Evidence of the Long Defendant's Motivation

Apex has presented evidence that it believes tends to show that the defendants were motivated by greed and by a strong dislike of Apex. Apex argues that such motivation tends to exclude the possibility of independent action because the long defendants had nothing to gain unless they acted in concert. As discussed above, however, it is not at all clear that one long defendant could not have forced Apex into some concessions. See Part IV.A.2, *supra*. Moreover, as each defendant became aware of the early nominations by the others, the advantages of inflexibility as to delivery date and location became evident. Since the early nominations became public knowledge, it became evident to anyone in the business that a profit could be made by forcing Apex to deliver. Thus, any motivation to "get" Apex gives rise to an inference of individual action which is equally as plausible as an inference of conspiracy. We therefore conclude that the long defendants' alleged motivation cannot succeed in establishing a conspiracy on the evidence herein.

4. *The Exchange Defendants*

Little of the evidence discussed thus far relates to the Exchange defendants. The strongest evidence presented by Apex to show that the Exchange defendants participated in a conspiracy consists of evidence of a number of communications between the Exchange defendants and the long defendants. However, the content of these conversations, even as characterized by Apex, amounts to

"jawboning" in an attempt to avert an impending default. We note that the Exchange also communicated with Apex as part of this effort. Moreover, Apex has offered no plausible motivation for the Exchange defendants to have participated in the alleged scheme. We therefore affirm the grant of summary judgment as to the Exchange and Raber, its vice-chairman.

The district court held alternatively that in addition to failing to prove participation by the Exchange defendants in a conspiracy, Apex failed to show bad faith, which the district court believes is necessary in an antitrust claim asserted against a self-regulating market such as the Exchange when the claim relates to the duty of the Exchange to maintain a fair and orderly market. *See* 641 F. Supp. at 1282; *see also P.J. Taggares Co. v. New York Mercantile Exchange,* 476 F. Supp. 72, 78-79 (S.D.N.Y. 1979). Since we have concluded that Apex has failed to present evidence linking the Exchange defendants to a conspiracy, we need not reach the issue of whether bad faith is a necessary element of the antitrust claims against the Exchange.

5. *Summary of Antitrust Claims*

Apex has presented massive additional materials that it claims amount to proof of a conspiracy when viewed in light of all of the circumstances herein. Some of it tends to indicate that several of the defendants disliked Apex. Some of it seems to indicate that some of the long defendants may have used the circumstances as they existed in February 1982 to "get" Apex. However, aside from the evidence related to Global, Belcher and Northeast, discussed above, none of it gives rise to a permissible inference of a conspiracy among the defendants. Consequently, for the reasons discussed principally in parts

IV.A.1 through IV.A.4, we affirm the dismissal of the antitrust claims as to all the other defendants.

B. Commodities Market Manipulation

The fifth claim in the amended complaint alleges that the defendants manipulated the commodities market in violation of the CEA, 7 U.S.C. § 13(b), which prohibits, *inter alia*, (1) any "attempt to manipulate the price of any commodity . . . for future delivery" and (2) delivery of "false or misleading or knowingly inaccurate reports concerning . . . market information or conditions that affect or tend to affect the price of any commodity in interstate commerce."

The amended complaint alleges first that the long defendants, with the assistance of the other defendants, "attempted to and did manipulate the price of No. 2 Heating Oil" by "cornering" or "squeezing" the market for No. 2 oil. Amended Complaint ¶¶ 72-73. It also alleges that the long defendants, with the assistance of the other defendants, disseminated false reports in violation of the CEA. The district court dismissed both aspects of this claim. On appeal, Apex only presents arguments for reinstatement of the manipulation aspect of the claim. We therefore leave undisturbed the district court's dismissal of the false reports aspect of the claim.

The district court dismissed the manipulative scheme portion of the claim because while Apex alleged that the long defendants together engineered a squeeze, it failed to present evidence of a conspiracy. 641 F. Supp. at 1275. Having reversed this determination with respect to Belcher in the context of the antitrust claims, we also do so in the context of the commodities manipulation claim.

Apex urges us to reverse as to all the long defendants on this claim despite the lack of evidence of a conspiracy, suggesting that each defendant alone could have manipulated the market. However, the amended complaint did not allege that *each* long defendant manipulated the market. Rather, it alleges that the "long defendants" did so. Since the complaint alleges collective action, this suit cannot be allowed to proceed as if it alleges individual action.

We do, however, reverse the dismissal of the manipulation allegation against Belcher. The dismissal of the fifth claim is in all other respects affirmed.

C. Failure to Regulate

Apex alleges as its seventh claim that the Exchange defendants failed to remedy the alleged market manipulation by the long defendants in violation of the CEA, 7 U.S.C. §§ 7(d), 7a(8). The district court dismissed this claim because it found that Apex failed to present evidence tending to show that the Exchange acted or failed to act as a result of self-interest or bad faith as interpreted in a number of this court's decisions. *See, e.g., Brawer v. Options Clearing Corp.*, 807 F.2d 297 (2d Cir. 1986); *Sam Wong & Son v. New York Mercantile Exchange*, 735 F.2d 653 (2d Cir. 1984). Apex on appeal argues that a number of statements by persons connected with the Exchange, most notably Julian Raber, could lead a reasonable juror to infer the existence of an improper motive in light of all of the circumstances herein. Having carefully reviewed the allegations and the proffered evidence, we affirm the district court's dismissal of the claim of failure to regulate for the reasons stated in the district court opinion. 641 F. Supp. at 1276-81.

CONCLUSION

The only remaining claims are those alleging (1) common law fraud by the long defendants and (2) a violation of section 4(b) of the CEA by the long defendants. Apex does not request reversal of the dismissal of these claims in its brief and offers no arguments suggesting why reversal would be appropriate. We therefore do not consider these claims.

Accordingly, for the reasons stated above, we reverse the dismissal of the antitrust and commodities market manipulation claims as to Belcher. These claims are remanded for further proceedings consistent with this opinion. As noted in note 1, *supra*, this appeal has been dismissed as to Northeast. The judgment of the district court in all other respects is affirmed.

ORDER OF THE SECOND CIRCUIT DENYING REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 21st day of July, one thousand nine hundred and eighty-seven.

No. 86-7898

APEX OIL COMPANY,

Plaintiff-Appellant,

—v—

JOSEPH DIMAURO, TRIAD PETROLEUM, INC., TIC COMMODITIES, INC., COASTAL CORPORATION, COASTAL STATES MARKETING, INC., BELCHER OIL COMPANY, THE BELCHER COMPANY OF NEW YORK, INC., BELCHER NEW ENGLAND, INC., BELCHER NEW JERSEY, INC., STINNES CORPORATION, STINNES INTEROIL, INC., EASTERN OF NEW JERSEY, INC., NORTHEAST PETROLEUM INDUSTRIES, INC., NORTHEAST PETROLEUM CORPORATION, GEORGE E. WARREN CORPORATION, NEW YORK MERCANTILE EXCHANGE and JULIAN RABER,

Defendants-Appellees.

A petition for rehearing having been filed herein by counsel for the appellees, COASTAL CORPORATION, COASTAL STATES MARKETING, INC., BELCHER OIL COMPANY, THE BELCHER COMPANY OF NEW YORK, INC., BELCHER NEW ENGLAND, INC., and BELCHER NEW JERSEY, INC.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

The Court notes that the manner of comparison of various early delivery nominations suggested by petitioner does not yield a significantly different result, and, when viewed in light of the other evidence, would still permit a jury to infer the existence of a conspiracy.

/s/ Lawrence W. Pierce
LAWRENCE W. PIERCE

/s/ Frank X. Altimari
FRANK X. ALTIMARI

Circuit Judges

/s/ John E. Sprizzo
JOHN E. SPRIZZO*

District Judge

* Hon. John E. Sprizzo, Judge, United States District Court for the Southern District of New York, sitting by designation.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

NOTICE ON SUGGESTION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eleventh day of August one thousand nine hundred and eighty-seven.

No. 86-7898

APEX OIL COMPANY,

Plaintiff-Appellant,

—v.—

JOSEPH DIMAURO, TRIAD PETROLEUM, INC., TIC COMMODITIES, INC., COASTAL CORPORATION, COASTAL STATES MARKETING, INC., BELCHER OIL COMPANY, THE BELCHER COMPANY OF NEW YORK, INC., BELCHER NEW ENGLAND, INC., BELCHER NEW JERSEY, INC., STINNES CORPORATION, STINNES INTEROIL, INC., EASTERN OF NEW JERSEY, INC., NORTHEAST PETROLEUM INDUSTRIES, INC., NORTHEAST PETROLEUM CORPORATION, NEW YORK MERCANTILE EXCHANGE and JULIAN RABER,

Defendants-Appellees.

A petition for rehearing having been filed herein by counsel for the defendants-appellees, Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New England, Inc., and Belcher New Jersey, Inc., (collectively "Belcher"), and the panel that heard

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the appeal having denied said petition for rehearing in an order filed on July 21, 1987,

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith,
Clerk

OPINION OF DISTRICT COURT

APEX OIL COMPANY, Plaintiff,

v.

Joseph DIMAURO, et al., Defendants.

No. 82 Civ. 1796 (JMW).

United States District Court,
S.D. New York.

Aug. 8, 1986.

Heating oil seller brought action against buyers and commodity exchange alleging various antitrust and securities laws violations. Defendants moved for summary judgment. The District Court, Walker, J., held that : (1) seller failed to prove concerted action on part of buyers, for purposes of antitrust conspiracy action, where evidence of buyers' parallel behavior and interfirm communications was equally consistent with independent competitive decisions; (2) antitrust conspiracy plaintiff may not prove conspiracy by hearsay admitted under coconspirator exception without first establishing existence of conspiracy by independent nonhearsay evidence; (3) allegation that Commodities Exchange acted in pure self-interest to avoid loss of investor confidence did not give rise to inference of bad faith, for purposes of liability for failure to regulate, because action to preserve investor confidence was action to preserve integrity of marketplace and thus was in public interest; (4) showing of bad faith was prerequisite to antitrust liability of commodities exchange; and (5) buyers of heating oil were not liable to seller for alleged misrepresentations of need for immediate delivery where seller did not act on alleged misrepresentation but rather in reliance upon its perception that commodities exchange would impose sanctions for failure to deliver on dates nominated.

Summary judgment granted for defendants.

See also 110 F.R.D. 490.

OPINION

WALKER, District Judge.

INTRODUCTION

Apex Oil Company brings this action against numerous defendants alleging antitrust conspiracy, Commodity Exchange Act violations, and fraud. The defendants are a number of companies and individuals, all of whom were participants in February 1982 in the futures market for No. 2 heating oil conducted through the New York Mercantile Exchange (the "Exchange").

Knowledge of the players in this case is critical. Plaintiff Apex Oil Company ("*Apex*") is a privately owned trader, refiner, and retailer of oil based in St. Louis. By uneasy convention, the defendants have been divided into two groups: The so-called "long defendants" include companies holding long positions in February 1982 heating oil contracts on the Exchange, their parent corporations, and brokers representing some of the companies. They are:

1. Joseph *DiMauro*, a broker in both the commodity futures market and the cash, or "wet," market for heating oil.

2. Triad Petroleum, Inc. ("*Triad*"), DiMauro's brokerage firm for wet market oil transactions.

3. TIC Commodities, Inc. ("*TIC*"), DiMauro's futures commission merchant firm, or brokerage firm for futures market oil transactions.

4. The Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New Jersey, Inc., and Belcher New England, Inc. (collectively "*Belcher*").

5. Stinnes Corporation and Stinnes Interoil, Inc. (collectively "*Stinnes*").

6. Eastern of New Jersey, Inc. ("*Eastern*").

7. Northeast Petroleum Corporation and Northeast Petroleum Industries, Inc. (collectively "*Northeast*").

8. George E. Warren Corporation ("*Warren*").

9. Former defendant Global Petroleum Corporation ("*Global*") will be referred to throughout.

The so-called "exchange defendants" are the *New York Mercantile Exchange* itself and *Julian Raber*, vice chairman of the Exchange.

While the facts and allegations require detailed exposition, all arise from the same occurrence. In February, 1982, Apex was a "short" in the futures market for No. 2 heating oil, that is, it had numerous contractual obligations to *sell* No. 2 oil through the Exchange. On the other side of the contractual equation were the "long" companies, those holding contracts to *buy* Apex's No. 2 oil. In the middle were the exchange defendants, through whose offices these obligations were created, regulated, and ultimately resolved.

The crux of the matter is that Apex did not have the oil in early February, 1982 when the defendant oil companies wanted it and accordingly claims it was obligated to purchase oil at artificially elevated prices to fulfill the contracts. After its unpleasant experience with this financial bind, Apex commenced this action, seeking damages on eight claims. The defendants have made six separate motions for summary judgment, which collectively address all claims by Apex.

THE COMMODITY FUTURES MARKET

A basic familiarity with the workings of the commodity futures market is an essential roadmap in this case. An excellent discussion on that score has been provided by the late Judge Friendly in *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982), upon which this Court

cannot improve. A few highlights drawn from that discussion create a sufficient background here.

A commodity futures contract is an executory contract for the purchase and sale of a particular commodity—No. 2 heating oil in this case. Everything about the contract is standardized except the price of the subject commodity, which is fixed by open outcry on the floor of the exchange at the time of contract formation. A single futures contract for No. 2 heating oil constitutes 1,000 barrels of oil at 42 gallons per barrel.

The seller of a contract, called a "short," commits to deliver the commodity at a future date. The buyer, called a "long," binds himself on that date to accept delivery of the commodity and pay the price agreed upon at formation of the contract. Most contracts, however, do not result in actual delivery by a short to a long. In the common situation, where a short or a long does not wish delivery of the physical item to occur, he will "liquidate" his positions prior to the close of trading in a particular futures contract. In this case, where the subject commodity was heating oil slated for delivery in February 1982, trading in the contract closed on January 29, 1982.

The liquidation of a contract before the close of trading lies at the heart of "futures trading." Money is made or lost by a participant when he liquidates by forming an opposite contract for the same quantity of the commodity so that his obligations to deliver and receive offset each other. That is, a short who does not wish to deliver must enter into an equal number of contracts to buy the commodity, i.e., long contracts. A long who does not wish to accept delivery must buy short positions. Gains or losses are measured by the difference between the prices of the offsetting contracts. If the market price of a future has increased prior to the close of trading, a long will realize a profit upon liquidation, while a short will lose. If the price has declined, the short will profit and the long will lose. It should be remembered that futures trading is a classic zero-sum game. Since every contract must have two sides, a long and a short, each gain by a market participant is accompanied by an equal loss by another participant.

In theory, there are two types of commodities customers: hedgers and speculators. The hedger is a trader with a parallel interest in the cash market for a commodity. He uses the futures market as a means of diminishing the risks faced in the cash market. While hedging is a complicated business, it may be generally grasped by imagining that the hedger is betting against his own cash market prospects by using the futures market. If he hopes to buy or sell a quantity of the cash commodity in the future, he will establish a position in the futures market which will be profitable if the price of the commodity moves in direction unfavorable to his cash market position. That way, losses in the cash market will be at least partially offset by gains in the futures market.

A speculator, on the other hand, is one who, in theory, has no real stake in the cash market and simply hopes to profit by trading in futures contracts as one might by investing in the stock market. By investing, the speculator assumes and seeks to profit from risks the hedger is specifically seeking to avoid.

The operation of a commodity futures market is characterized by several layers of professionals. A futures commission merchant, or broker, deals directly with the commodities customer. The broker communicates the customer's orders to a clearing member, an organization or individual with membership in the exchange. The broker may also be a clearing member, in which case the intermediate step is absent. As will become evident, the broker also plays an active role should the customer wish to deliver or take delivery of the actual commodity.

The clearing member then executes the order to buy or sell by way of a floor broker who stands on the actual floor of the exchange and makes contracts by open outcry and hand signals. An entity called a "clearing house," of which each clearing member is a part, plays a crucial role in the entire process. The clearing house is the heart of the exchange and operates as a seller to all buyers and a buyer to all sellers, thus facilitating the interchangibility of contracts and the liquidation of positions. The presence of this entity means an investor who wishes to liquidate

or take delivery can always find a willing partner through the clearing house.

As discussed earlier, the most common outcome in the futures market is a liquidation of positions before the close of trading in a contract. Actual delivery of the commodity, however, does occur and that delivery process is critical to this case. In general, delivery is arranged when a short and a long each notify the exchange that they stand to give or take the possession of the subject commodity and not liquidate. When this occurs, the clearing house matches delivering shorts with accepting longs. As will be shown below, however, the matching details of place, method, and timing of delivery and any default or delinquency penalties are entirely the creature of the exchange's rules.

If the holder of a contract fails to liquidate by the close of trading, delivery under the exchange rules may yet be avoided by agreement between the parties to "exchange futures for product" or an EFP. In such a transaction, the delivery obligation under the exchange contract is superseded by a new contract providing for the short to deliver product on the wet market.

FACTUAL BACKGROUND

A detailed discussion of the facts will be included in the analysis of evidence at issue on each motion for summary judgment. A basic outline of the undisputed facts, however, will serve as a useful background for the evidentiary maze that follows.

The last day of trading on the Exchange for the February 1982 contract in No. 2 heating oil was Friday, January 29. Under the Exchange rules, all contracts not intended for delivery or EFP resolution had to be liquidated by the close of trading on that day. By the end of January 29, Apex held a short – i.e., a seller's – unliquidated position on 4,378 contracts. Since each contract represents 1,000 barrels at 42 gallons per barrel, Apex was obligated on its contracts to deliver 183,876,000 gallons of heating oil in February 1982.

By the close of trading that day, the other side of the contract picture had also crystallized. While there were 4,906 total contracts open and designated for delivery, 1,945 of those were held on the long side by six oil companies alleged by Apex to be wrongdoers. On January 29, 1982, the six held the following number of long contracts:

Northeast	748
Warren	170
Belcher	315
Stinnes	300
Eastern	50
Global	362

On Monday, February 1, 1982, Goldman Sachs & Co. ("Goldman"), Apex's clearing member, submitted to the Exchange a "Delivery Notice for Petroleum Products Futures" for its short contracts. Under the rules of the Exchange, the short was obligated to select a delivery site in New York Harbor for its contracts upon submission of the Delivery Notice. Apex chose the GATX terminal in Carteret, New Jersey as the delivery site for 4,281 of its 4,378 contracts. The remaining 97 contracts were designated for delivery at the B.P. terminal at Tremley Point, New Jersey.

Also on Monday, February 1, pursuant to the rules, the clearing members for the longs submitted the required "Notice of Intention to Accept Petroleum Products Futures." As usual, the clearing house operated to match receiving longs with delivering shorts and, on February 2, the Exchange issued Allocation Notices matching up longs and shorts for delivery. Apex was assigned to deliver the full amount due to each of the six longs, except for fifteen of Warren's contracts.

Under the Exchange rules, which were incorporated into each contract, a long was obligated between the second and fifth business day of the delivery month to designate the date and method of delivery. Delivery was permitted by barge, tanker, truck, pipeline, intra-facility transfer, inter-facility transfer, or

book transfer. Intra-and inter-facility transfers are oil pump-overs between tanks at one facility and more than one facility, respectively. Book transfer under the rules, commonly referred to as inventory transfer, is accomplished "by transfer of title to the buyer without physical movement of product." The parties also employ the term "book transfer" to mean an accounting method by which companies holding mutual delivery obligations extinguish those obligations on their books without any actual transfer of title or oil. The Court will adopt the parties' practice and use "book transfer" to mean the accounting mechanism for extinguishing obligations; "inventory transfer" will connote transfer of title without movement of oil.

The nomination for each contract had to be delivered to the clearing house by no later than 4:30 p.m. on the fifth business day of the delivery month. In this case, the deadline was Friday, February 5, 1982.

Under the rules of the Exchange, a long could designate for delivery any day between the beginning of the first calendar day *after* the fifth business day of the month and the calendar day *before* the last business day of the month. In this case, that meant the earliest day on which delivery could be demanded was Saturday, February 6. A short was obligated to deliver on the designated delivery day and as soon as the designated barge or tanker reported readiness to load or as soon as the buyer reported the transfer facility or truck ready to accept the product.

Apex contends the long defendants, with the aid of broker DiMauro, agreed unlawfully during the first days of February to nominate their contracts for delivery in the first three delivery days of February, that is, February 6, 7, and 8. While there is a sharp dispute as to whether the defendant longs agreed to do so, there is no dispute that they in fact did nominate a large number of their contracts for delivery on the first few days. A chronology of those nominations is as follows:

February 2—Global nominated to take 51 of its contracts by barge on the morning of February 6 and 23 by barge on February 7.

—*Belcher* nominated to take all 315 of its contracts by barge at 12:01 a.m. on February 6.

—*Northeast* nominated to take 200 contracts by tanker at 8:00 a.m. on February 8, 1986.

—*Warren* nominated all 155 of its Apex-matched contracts for February 6.

February 3—*Northeast* nominated 75 contracts for barge receipt at 6:00 p.m. on February 6.

—*Northeast* nominated three separate barge loadings of 70 contracts each for 2:00 p.m. on February 6, noon on February 8, and noon on February 10.

—*Northeast* nominated 75 contracts for barge receipt at 6:00 p.m. on February 9.

—*Northeast* nominated to take 75 contracts by barge on February 10.

—*Northeast* nominated to take 75 contracts by barge at 6:00 p.m. on February 12.

—*Global* nominated to take 25 contracts by barge at 6:00 a.m. on February 6.

February 4—*Stinnes* nominated to take its 300 contracts by inventory transfer on February 6.

February 5—*Eastern* nominated to take all 50 of its contracts by inventory transfer on February 6.

—*Global*, altering nominations previously made but not listed above, nominated to take 111 contracts by book transfer on February 6.

—*Global* nominated an additional 25 contracts for inventory transfer on February 6.

—*Northeast* nominated to take 13 contracts by book transfer and 25 contracts by inventory transfer on February 10.

On Wednesday, February 3, Jeffrey Atkin, a member of the Exchange and a floor broker representing long interests, stated on the floor of the Exchange that Apex would be unable to make delivery. The Control Committee of the Exchange was convened that same day to hear Atkin's statements. The Control Committee is a body charged by the exchange by-laws with the "endeavor to correct any circumstances which interfere with or might interfere with the normal functioning of the market." It investigates market problems and attempts to resolve them by informal discussions, or "jawboning," with members of the Exchange. The minutes of the February 3 committee meeting reflect that Atkin said "he had learned from industry sources that Apex did not have oil to deliver to his customers." That same day, the Control Committee contacted Apex's clearing member, Goldman, and requested and received assurances that Apex had oil to deliver at GATX at the times requested by the longs.

On February 4, Goldman told the committee that Apex would make timely delivery using 750 contracts coming from Amoco and another 400 owned by or owed to Apex presently at GATX.

On February 5, however, Goldman informed the Control Committee that Apex's situation was different than previously represented. Apex did not have the necessary oil available at GATX. The 750 Amoco contracts would not be available for delivery to GATX on February 6, 7, or 8. In fact, there was a *negligible* amount of oil available for delivery at GATX on February 6.

During February 4 and 5, the Control Committee, under the leadership of acting committee chairman and defendant Julian Raber, spoke to the clearing members representing holders of long positions in February. The clearing members were asked to urge their customers to agree to change delivery dates and sites. By the end of the day on February 5, all contracts slated for delivery on February 6 had been resolved with the exception of Stinnes' 300 contract nomination. In the late evening on February 5, in an effort to resolve the remaining contracts under this nomination, Raber met privately with DiMauro of TIC in the "Market Bar" restaurant at the World Trade Center. Both men testified

that Raber urged DiMauro to negotiate with Apex to resolve the contracts and avert a crisis.

Eventually, all the delivery obligations were satisfied by EFP or delivery and Apex did not default. The resolution of this difficult situation, however, is the basis for Apex's claims. Apex claims that the long defendants conspired (with the conspiratorial acquiescence of the Exchange and Raber), manipulated, and fraudulently insisted on delivery in the first few delivery days of February. In addition, it claims that Raber and the Exchange violated their statutory duties by failing to remedy the unlawful position in which Apex was placed. As a result, Apex alleges that it was forced to meet its delivery obligations by purchasing artificially high-priced oil on the cash market and from the longs themselves.

For example, while the February contract for No. 2 oil closed at a price of 89.7 cents per gallon, Apex alleges that it had to purchase 500,000 barrels of oil from Northeast at 96.25 cents per gallon and then transfer the product back to that company in satisfaction of its futures contracts with Northeast. Also on February 5, Apex claims it purchased 362,000 barrels from Global at 95 cents per gallon and transferred the oil back to Global to resolve its February contracts with that company. Additionally, Apex alleges it paid 97.5 cents per gallon for oil from Stinnes and Eastern which was then delivered back to those companies in resolution of the February contracts.

In short, Apex believes that it was forced to buy into the "wet market" at artificially high prices as a result of the fraud, conspiracy, and manipulation by the various defendants and that the exchange defendants failed to remedy the unlawful situation by permitting deferred delivery. It is this unhappy series of events which gives rise to the eight claims asserted in the amended complaint to which we now turn.

THE ALLEGATIONS

(1) *Antitrust.* The first four claims for relief allege violations of the Sherman Act, 15 U.S.C. § 1 *et seq.* ("the Act").[1] The first three allege violations of Section 1 of the Act; the last involves Section 2. All four seek treble damages under the Act.

(a) Claim I alleges that the long defendants *and* the exchange defendants conspired to nominate for early delivery of the oil due the longs on their futures contracts.

(b) Claim II alleges that the long defendants, conspired not to deal with Apex and refused to sell or make available No. 2 oil and as a result created an artificially high price for the oil in February 1982.

(c) Claim III alleges that the long defendants conspired to limit Apex's access to sources of No. 2 oil in February 1982 and as a result created an artificially high price for the oil.

(d) Claim IV alleges that the long defendants conspired to monopolize the market for deliverable No. 2 heating oil in early February 1982.

(2) *Commodities Manipulation.* Claim V alleges all defendants violated Sections 9(b) and 13(a) of the Commodity Exchange Act, 7 U.S.C. §§ 13(b), 13c(a), both by manipulating the price for No. 2 oil on the Exchange in February 1982 and by participating in the spreading of false reports about Apex. (These claims have been abandoned as to the exchange defendants. *See* discussion, *infra.*)

(3) *Fraud*

(a) Claim VI alleges fraud by the long defendants under Section 4b of the Commodity Exchange Act.

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[1] The Amended Complaint also alleges in the first four claims that defendants violated Section 340 of the New York General Business law. Apex has not argued that analysis of the conspiracy claims is different under this provision than under the Sherman Act. Accordingly, the discussion of the Sherman Act claims applies as well to the New York claims.

(b) Claim VIII alleges common law fraud by the long defendants.

(4) *Regulatory Failures.* Claim VII alleges the exchange defendants violated the Commodity Exchange Act and rules promulgated by the Commodity Futures Trading Commission by failing to properly regulate the trading and delivery of No. 2 heating oil under exchange contracts in February 1982.

After over three years of discovery in this fact-intensive case, including more than 120 depositions and the production of mountains of documents, the defendants have made summary judgment motions which collectively address all claims. The motions have been extensively briefed in support and opposition and argued orally at great length.

ANTITRUST AND THE LONG DEFENDANTS: CLAIMS I-IV

(1) *Introduction*

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal ...

26 Stat. 209, as amended, 15 U.S.C. § 1.

Section 2 of the Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor ...

26 Stat. 209, as amended, 15 U.S.C. § 2.

The defendants have narrowly addressed their summary judgment motion on the four antitrust claims to the question of conspiracy. Without conceding that a conspiracy would be *per se*

unlawful in the context of this case, the defendants contend there is no material issue of fact concerning the allegations that:

– all defendants conspired to demand delivery of the No. 2 oil in early February 1982;

– the long defendants conspired to limit Apex's access to No. 2 oil;

– the long defendants conspired to fix the price of No. 2 oil; and

– the long defendants conspired to monopolize the market for No. 2 oil in early February 1982.

In short, the defendants argued there is no triable issue of fact as to whether *any* conspiracy existed with respect to the February 1982 heating oil futures contracts.

(2) *Summary Judgment Standard*

Under Fed.R.Civ.P. 56(c) the movant on a summary judgment motion bears the burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & CO.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Once the movant has carried this burden, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The non-movant must "do more than simply show that there is a metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, ____ U.S. ____, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Where the record could not lead a rational trier of fact to find for the non-movant, "no genuine issue for trial" exists. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

The Supreme Court's recent decision in *Matsushita* explains the standard for summary judgment in the context of an antitrust conspiracy and details the method by which a district court should examine the voluminous record in search of a "genuine issue for

trial." While some controversy may have existed prior to *Matsushita* concerning the proper standard for *horizontal* conspiracy cases such as this one, the first sentence of Justice Powell's opinion leaves no doubt as to that case's broad application: "This case requires that we again consider the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case." *Id.* 106 S.Ct. at 1351.

The teaching of *Matsushita* and the Court's earlier decisions in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) and *Cities Service* is that summary judgment *is* available in the context of a large antitrust conspiracy case. In fact, the authorities indicate that the nature of such a case demands that the district court, in considering summary judgment, give searching scrutiny to the inferences available from the typically ambiguous mass of evidence.

In *Matsushita*, the district court had been faced with a summary judgment motion in an action that had been through years of discovery and involved twenty-one co-defendant corporations from the Japanese electronics industry. The trial court found that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy. 106 S.Ct. at 1352. The Third Circuit reversed the grant of summary judgment, holding that, based on inferences from the admissible evidence, "a reasonable factfinder could find a conspiracy. . ." *Id.* at 1353. In reaching that conclusion, however, the Third Circuit "apparently did not consider whether it was as plausible to conclude that petitioners'. . . behavior was independent and not conspiratorial." *Id.*

The Supreme Court held that the Third Circuit had applied the wrong standard. It concluded that the appeals court should have been more skeptical in its treatment of inferences drawn from the evidence of conspiracy in an antitrust case because "antitrust law limits the range of permissible inferences from ambiguous evidence. . ." The Court reiterated its earlier holding in *Monsanto* that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support

an inference of antitrust conspiracy." *Id.* at 1357 (citing *Monsanto*, 465 U.S. at 764, 104 S.Ct. at 1471).

Building upon *Monsanto*, a case which involved an alleged *vertical* price-fixing conspiracy, the Court promulgated a general rule for *all* antitrust conspiracy cases:

> To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently [citing *Monsanto*]. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action. . .

106 S.Ct. at 1357.

Matsushita involved allegations that the defendant Japanese electronics manufacturers and distributors had violated Section 1 of the Sherman Act by "dumping" products in the United States market and engaging in concerted "predatory pricing" in an effort to dominate the American market for electronics products with a view to subsequently raising prices. The petitioners in *Matsushita* argued that in light of the evidence's ambiguity, the absence of any rational motive to engage in predatory pricing, and the fact that the subsequently higher prices necessary to offset the predatory pricing losses had not occurred after twenty years, no trier of fact could reasonably conclude that the conspiracy existed.

The Supreme Court agreed that since predatory pricing was economically nonsensical, the admissible evidence did *not* tend to exclude the competing inference of independent procompetitive conduct. The Court reemphasized "that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter pro-competitive conduct . . . [M]istaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* at 1360 (citations omitted).

In this case, Apex has argued, in effect, that *Matsushita* cannot mean what it seems to say because the Court failed to overrule its earlier decision in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). In *Poller*, the Court considered the propriety of summary judgment in the context of an antitrust conspiracy case involving an alleged attempt by CBS and an affiliate to dominate the UHF television market in Milwaukee, Wisconsin. In a fact-specific decision, the Court concluded that summary judgment was inappropriate: "We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude that it should not have been granted." *Id.* at 473, 82 S.Ct. at 491.

In reversing the grant of summary judgment, the Court in *Poller* did employ language that appears contrary to the spirit of *Matsushita*:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

368 U.S. at 473, 82 S.Ct. at 491 (footnote omitted).

Plaintiff naturally relies heavily on this language to urge that summary judgment must be used sparingly in complex antitrust cases. However true that sentiment may have been in 1962, it is not true today. The Supreme Court's recent opinions, particularly those in *Monsanto* and *Matsushita*, signal a marked change from the reticence to grant summary judgment of *Poller*, a change spurred, perhaps, by the onslaught of massive antitrust litigation over the last twenty years and the attendant stress on the administration of justice. It is also significant that *Matsushita*,

in elucidating a standard which requires the district judge to carefully parse inferences before sending an antitrust case to a jury, does not mention *Poller*, a silence which speaks volumes about the Court's intentions.

The Supreme Court's recent decisions in *Anderson v. Liberty Lobby, Inc.*, ____ U.S. ____, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) and *Celotex Corporation v. Catrett*, ____ U.S. ____, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) offer further encouragement to a district court to utilize the summary judgment procedure. In *Anderson*, the Court decided that a district court, after assessing the proofs submitted by the non-movant plaintiff, should grant summary judgment in a libel case unless they met the "clear and convincing" standard required to prove malice. Citing *Cities Service* and *Adickes*, the Court made clear that a summary judgment motion is to be treated in the same manner as one for a directed verdict: The question is not whether there is *any* evidence supporting the non-movant but whether "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id.* ____ U.S. at ____, 106 S.Ct. at 2511 (citation omitted). Thus, the Court reasoned, analysis in light of the appropriate evidentiary standard was required.

In *Celotex*, the Court held that even where the movant's proofs were meager and failed to negate the opponent's claims, summary judgment shold still be granted where the evidence of the non-movant was deficient as to a necessary element of the claim as to which the non-movant bore the burden of proof. In that situation, summary judgment should be granted "since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.* ____ U.S. at ____, 106 S.Ct. at 2553. The "showing" required for the summary judgment movant to meet its initial burden did not require actual evidence but merely a "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id.* ____ U.S. at ____, 106 S.Ct. at 2554.

Both *Anderson* and *Celotex* reaffirm the principle that the summary judgment procedure should be used to dispose of cases that should not be tried. As the Court stated in *Celotex*,

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just speedy and inexpensive determination of every action."

Id. ____ U.S. at ____, 106 S.Ct. at 2555 (citations omitted).

In *Modern Home Institute, Inc. v. Hartford Accident and Indemnity Company*, 513 F.2d 102, 110 (2d Cir.1975), Judge Mansfield wrote that summary judgment is particularly appropriate where an antitrust plaintiff has had ample opportunity "to obtain whatever proof of a conspiracy there may be in the hands of defendants." In that situation, "[i]f the most that can be hoped for is the discrediting of defendants' denials at trial, no question of material fact is presented." *Id.* (citations omitted).

More recently, the Seventh Circuit stressed the potentially important role of summary judgment in large antitrust cases:

> When a District Court has afforded the parties eight years of unlimited discovery, the parties have designated the evidence on which they will rely at trial, and the Court has had an opportunity to review the evidence and concludes that no reasonable jury could return a verdict for plaintiffs, judicial economy mandates that summary judgment be entered. A trial on such claims would serve only as a forum for impeachment and argument by counsel; not for the presentation of evidence.

Weit v. Continental Illinois National Bank & Trust Co., 641 F.2d 457, 464 (7th Cir.1981) (citations omitted), *cert. denied*, 455 U.S. 988, 102 S.Ct. 1610, 71 L.Ed.2d 847 (1982).

In *Matsushita*, the Supreme Court made it clear that in an antitrust conspiracy case ambiguous evidence is to be treated skeptically on a motion for summary judgment, since an inference of unlawful conduct which arises only from ambiguous evidence will be of no use to the plaintiff at trial. In *Monsanto*, the Court

warned that a standard which permitted trial on the basis of such inferences presented "a considerable danger" that pro-competitive conduct would be discouraged. 465 U.S. at 763, 104 S.Ct. at 1470. The test enunciated in *Matsushita* also dictates that ambiguous evidence, because it is by definition incapable of a dominant inference, will not alone defeat a motion for summary judgment.

[1] In this case, defendants' sworn denials are more than sufficient to shift the burden to plaintiff under Fed.R.Civ.P. 56(e). *Weit*, 641 F.2d at 461; *see Celotex*, ____ U.S. at ____, 106 S.Ct. at 2553. Thus, to survive defendants' motion for summary judgment, Apex must establish that there is a genuine issue of material fact as to whether defendants entered into a conspiracy. To make such a showing, Apex must offer significant probative evidence which tends to exclude the possibility that the alleged conspirators acted independently. *Matsushita*, 106 S.Ct. at 1357; *Cities Service*, 391 U.S. at 285, 88 S.Ct. at 1590-91; *Weit*, 641 F.2d at 462.

(3) *Parallel Conduct*

It is a "familiar doctrine that the existence of a conspiracy rarely can be established by direct proof but usually is inferred from acts, declarations and conduct of the alleged members of the unlawful combination." *Hunt v. Mobil Oil Corp.*, 465 F.Supp. 195, 223 (S.D.N.Y.1978) (citations omitted), *aff'd mem.* 610 F.2d 806 (2d Cir.1979). And, as discussed, *Matsushita* makes it the duty of the court on summary judgment to carefully examine circumstantial evidence and its concomitant ambiguities.

[2] Circumstantial evidence alone, however, can be sufficient to support a finding of an antitrust conspiracy. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939). In fact, as in this case, parallel business behavior—"conscious parallelism"—is the type of circumstantial evidence often relied upon to support an allegation of conspiracy. As will be seen, Apex devotes substantial effort to the construction of an inference of conspiracy from proof of parallel conduct plus a wide range of alleged circumstantial evidence. While the parties have disputed the extent to which Apex relies on parallelism

to infer conspiracy, it is obvious that that method of proof is at the heart of Apex's attempt to survive this summary judgment motion.

In *Interstate Circuit*, plaintiff alleged that a group of motion picture distributors had conspired to restrict later showings of newly distributed films in certain Texas cities, thus benefiting first-run theatres. There was no direct evidence in the case showing that the distributors had agreed with one another to impose the restrictions, but each distributor knew the others had considered the same proposal and knew the restrictions would work only if adhered to by all distributors. In addition, concerted action would create a likelihood of increased profits for each individual distributor which did not exist if less than all distributors imposed restrictions.

On those facts, the Supreme Court held that an inference of agreement to restrain competition could reasonably be drawn. In *Cities Service*, the Court explained that the inference was possible in a case like *Interstate Circuit* because the parallel behavior there was accompanied by an identical motive: each conspirator stood to gain greatly from a cartel. On the other hand, independent action would rationally lead to economic losses since others could not be counted on to act in the same manner.

The facts in *Cities Service* were markedly different and permitted no inference of conspiracy from circumstantial evidence of parallel action. In that case, plaintiff claimed that Cities Service Oil Co. ("Cities Service") was part of a conspiracy among oil companies to refuse to buy plaintiff's Iranian oil. The Court held that although Cities Service, like the other oil companies, had refused to deal, an inference of conspiracy did "not logically follow" because Cities Service could not possibly have benefited from a refusal to deal with the plaintiff; it made no economic sense for Cities Service to join the boycott. 391 U.S. at 287, 88 S.Ct. at 1591-92.

Modern Home sheds further light on the use of parallel behavior in the antitrust context. There, the Second Circuit noted

that "parallel behavior alone is not sufficient evidence of conspiracy" and the mere fact that all defendants acted in the same manner, even if each "knew the other defendant companies were doing like-wise, is not enough to defeat the motion for summary judgment." 513 F.2d at 110 (citations omitted). The court explained that where the parallel conduct demonstrated by plaintiff was "consistent with independent competitive decisions. . . [,] [a]dditional facts or circumstances are needed to show that the decisions were interdependent and thus raise the inference of a tacit agreement. . ." *Id.* On the other hand, "[a]ctions against the apparent individual economic self-interest of the alleged conspirators may raise an inference of interdependent action," as may actions which would make economic sense *only* if done in concert. *Id.* at 111.

(4) *The Evidence*

We now turn to the evidence offered by Apex to determine if it has met its burden of producing significant probative evidence of concerted behavior which tends to exclude any competing inference of independent action. In its opposition papers, Apex has attempted to divide its case for conspiracy into direct and circumstantial evidence. In this regard, Apex contends it has offered sufficient direct evidence of a conspiracy among the defendants to defeat a motion for summary judgment without recourse to inferences from circumstantial or ambiguous proof. As will be seen below, however, the distinction between direct and circumstantial evidence is a murky one, particularly in the context of an alleged antitrust conspiracy where confessions and smoking guns are few and far between. As one court has noted: "It does not strain credulity that solemnized covenants to conspire are difficult to come by in any price fixing case." *In re Plywood Antitrust Litigation*, 655 F.2d 627, 633 (5th Cir.1981), *cert. dismissed sub nom. Weyerhaeuser v. Lyman Lamb*, 462 U.S. 1125, 103 S.Ct. 3100, 77 L.Ed.2d 1358 (1983).

It is also apparent from the organization of Apex's memorandum in opposition that it intends to present an imposing overall picture of a conspiracy constructed from a myriad of evidentiary

inferences. While any one piece might not reasonably infer conspiracy, Apex attempts to present a completed puzzle which will. The sheer volume and desultory organization of the facts presented makes dissection of Apex's evidence an unenviable task, but it is an effort mandated by *Matsushita*.

It must be remembered throughout this exercise that an assumption of conspiracy is *not* the starting point after which each event must be explained away by the defendants. Rather, it is Apex, now faced with unequivocal sworn denials, that must demonstrate that the evidence, construed in its favor, supplies an inference of conspiracy that is reasonable in light of any competing inference of independent conduct proffered by the defendants. In this regard, it is critical that Apex's often bewildering effort to treat the "longs" as a monolith be resisted. Evidence must be presented which tends to establish that *each* defendant made a conscious commitment to concerted action. Moreover, inadmissible hearsay may not be considered and the co-conspirator exception to the hearsay rule may only be employed after Apex has offered evidence which independently tends to establish that the declarant under consideration is a member of the conspiracy.

(a) *"Direct" Evidence*

1. *Schultz Testimony.* Apex offers the testimony of Jerry Schultz, a commodities trader in 1982 with Tipco Products, Inc., as direct evidence of conspiracy. Tipco held a long position in February contracts and had been matched for delivery with Apex. Schultz testified at his deposition that on the morning of Tuesday, February 2, he received a phone call from Joe DiMauro's brother Sal, of defendant Triad. Triad was a broker who represented parties to wet market contracts. Apex characterizes Schultz's testimony as stating that Sal DiMauro invited him to participate in a "short squeeze" of Apex. Apex contends Schultz was asked by Sal DiMauro to nominate Tipco's contracts for early delivery and "came to understand the conspiring longs included Belcher, Northeast, Stinnes and Global."

Schultz testified that he was concerned about nominating early in the delivery month because he had no storage. In response, Sal DiMauro stated that storage arrangements could be worked out. When Schultz expressed uncertainty over the proper steps for nomination, Sal DiMauro had a representative of TIC, the commodities broker, call and explain the nomination process. When Schultz continued to have questions, he asked for a telex explaining the necessary steps. Instead, he received a copy of a telex addressed to Conticommodity Inc. ("Conti"), Tipco's clearing member at the exchange, stating that Tipco wished to take delivery of all its February contracts on February 6, the first possible delivery date. Schultz testified that he never authorized the sending of the telex to Conti.

Apex argues that this testimony is direct evidence that Sal DiMauro, brother of defendant Joe DiMauro, and an employee of defendant Triad, was recruiting co-conspirators to nominate early and demand delivery from Apex. Despite Apex's effort, however, this testimony produces no direct evidence and, in fact, only serves to create extremely ambiguous circumstantial evidence of conspiracy.

Apex has mischaracterized Schultz's testimony. The full text of the Schultz deposition reveals that he was *never* asked to participate in a "short squeeze" and DiMauro *never* used those words in their conversation of February 2. Schultz said he did not think DiMauro was asking Tipco to nominate on the first delivery day and no one tried to pressure him to nominate on a particular day. Contrary to Apex's phraseology, Schultz *never* "came to understand the conspiring longs included Belcher, Northeast, Stinnes and Global." He merely testified that "at some point" he "came to realize" that those companies were among those holding long positions matched with Apex. All this, of course, was market information.

Even if it may be concluded from Schultz's testimony that he knew a "short squeeze" was taking place, it is entirely unclear what he intended that term to mean. Schultz's use of the phrase is susceptible to two radically different meanings. It could import a conspiratorial effort to apply pressure on a short or it could

mean a circumstance brought about by market forces upon a short's failure to secure adequate supply. Thus, even if Schultz's testimony is construed as Apex wishes, it does not support an inference of conspiracy which tends to exclude the inference of independent action; at best for Apex, it is ambiguous.

The remainder of the circumstantial evidence gleaned from Schultz's testimony by Apex is of little use. The offer of storage by DiMauro is probative of nothing; DiMauro was a broker for Tipco who attempted to facilitate transactions for his customers and stood to receive a fee for arranging storage. The telex sent to Conti on behalf of Tipco is ambiguous. It was a *preliminary* indication of a desire to nominate and expressly provided that "further delivery instructions" were intended. In light of the fact that Schultz had inquired as to the procedure for nomination, the telex at best presents competing inferences. Any inference of conspiracy drawn from it simply does not "tend to exclude" the competing inference that it was the work-product of an aggressive brokerage firm soliciting its client's business.

2. *Densieski Statements.* Apex offers as direct evidence the statements of Tony Densieski, an employee of Texas Energy, another long matched with Apex in February 1982. Densieski's statements are reported first by John Treat, Senior Vice-President of the Exchange, who described a telephone conversation with Densieski in February, during which Densieski allegedly reported that he had been recruited by unspecified "longs" to take advantage of Apex's "difficult position." Neither Densieski nor Texas Energy are alleged to be co-conspirators, so Densieski's statements, as reported by Treat, are inadmissible hearsay. And even if this testimony were admissible, it is of minimal probative value. Considering the size of the open position on the Exchange in February contracts, the vague reference to "longs" is non-probative against the defendants.

Other statements by Densieski are reported through the testimony of Paul Beenen, an employee of the Exchange, who testified that he too spoke to Densieski in February 1982. Not only is this testimony also inadmissible hearsay, but it does no

more than state that "people" were taking "advantage" of Apex because it was "subject to market pressures and did have to go to the cash market to get oil that they eventually didn't have in place...." This is merely evidence that Apex had difficulty meeting its obligations and that unspecified parties were doing unspecified things to take "advantage" of the situation.

It should be noted here, and remembered throughout the discussion of Apex's evidence, that there is nothing unlawful about "taking advantage" of Apex. The fact that a long, aware of Apex's shortage of deliverable oil, chose to stand by its nomination and extract concessions from Apex at most shows the long and Apex are players in an aggressive market. Such conduct may not be nice, but it does not tend to establish an actionable antitrust violation. The issue at the heart of this discussion is whether two or more defendants *together* decided to exercise their rights and by so doing take advantage of Apex. Without proof of concerted action, the parallel assertion of legal rights provides no reasonable inference of conspiracy. *Hunt v. Mobil Oil Corp.*, 465 F.Supp. 195, 229 (S.D.N.Y.1978), *aff'd mem.* 610 F.2d 806 (2d Cir.1979).

3. *Bernstein Statements.* Apex claims Jay Bernstein, an employee of Northville Caribbean, another long matched with Apex, presents direct evidence of the conspiracy. It says Bernstein knew "other longs were forcing Apex to deliver early and were offering Apex a buy out at very high prices.... Northville Caribbean, however, elected not to participate in the conspiracy."

This characterization of Bernstein's testimony is absurd. He never spoke of a "conspiracy." And even his actual testimony, while nonhearsay, is of dubious probative value because he referred only to "other longs" and said he had no personal knowledge of the longs' actions.

4. *Raber Statements.* The fourth piece of so-called direct evidence presented by Apex is provided by the reported statements of defendant Julian Raber, vice chairman of the Exchange, and an alleged co-conspirator. Patricia Lyons, an employee of Apex, recorded that Raber told her on February 11, 1982 that he was

aware there had been "a conspiracy to 'squeeze the shorts.' " Paul Novelly, President of Apex, also testified that Raber later referred to the events of the first week of February as a "sting."

These statements are inadmissible hearsay. Fed.R.Evid. 801(d) provides:

> A statement is not hearsay if—
>
> (2) The statement is offered against a party and is ... (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

At oral argument, Apex's counsel stated that it is Apex's contention that the conspiracy began on February 1, 1982 and ended no later than February 8, 1982. Thus, these statements, even if construed in the manner urged by Apex, were made *after* the completion of any conspiracy and not "during the course of" a concerted effort. The statements also cannot be characterized as ones made "in furtherance" of the conspiratorial enterprise. It hardly furthers a conspiracy's purposes for a co-conspirator to implicate his fellows. Lyons also never said Raber used the word "conspiracy"; that was a helpful gloss added by her. Moreover, the use of the term "sting" by Raber is as consistent with independent action as with a conspiracy. Finally, as discussed below, there is no independent evidence to establish that Raber was a member of the conspiracy and was therefore ever capable of making a "co-conspirator" statement.

5. *Karam Statements.* Apex's fifth piece of "direct" evidence consists of the statements of Fred Karam, president of Karam Petroleum Company. Edwin Wahl, an Apex employee, testified that he spoke to Karam on the third or fourth day of February and Karam told him that defendant George E. Warren Corporation was "trying to blank you," that is, trying to get Apex.

First, this testimony is nonprobative. Karam *actually* told Wahl that "he had heard some rumors" that Warren was out to get Apex; he never said someone from *Warren* declared that company's malicious intention. Even a direct statement of Warren's

animus towards Apex, however, would not be probative of a *conspiracy* to get Apex. As noted earlier, there is nothing illegal about aggressive, even nasty, competitive behavior standing alone. Second, even if Karam was reporting statements by Warren employees, the testimony of Wahl about Karam statements about Warren statements is double hearsay and inadmissible.

6. *Atkin Statement.* The final piece of evidence claimed to be direct by Apex is the statement of Jeffrey Atkin, the floor broker for several of the long defendants. Daniel Mancusi, head of the Exchange clearing house, testified that Atkin told the February 3 meeting of the Exchange's Control Committee that "one or two of his customers were out to get Apex."

This statement, too, is inadmissible hearsay. Atkin is not an alleged co-conspirator. Even if the statement were admissible, it is of little probative value concerning the conduct of particular defendants. Mancusi's report of Atkin's statement does not specify what "customers" Atkins meant or what being "out to get" Apex entailed.

Finally, the fact that "one or two" customers sought to "get" Apex is neither probative nor surprising. There is no serious dispute in this case that Apex was not well-liked. The market had moved sharply against the longs since the purchase of their contracts. They had purchased the February contracts at prices ranging from $1.0375 to $.9020 per gallon and the closing price for February oil was $.897 per gallon. During the market's fall in late January they had been forced to expend substantial sums on margin payments. The longs believed that it was Apex's massive expansion of its short position during January which depressed the futures price for No. 2 oil, forcing them to incur margin costs and allowing Apex to reap large liquidated and unliquidated (i.e., paper) profits. In fact, it is the defendants' contention – and the subject of counterclaims – that Apex played a high-stakes game of expansion in short positions right up until the close of trading on January 29 in the hope that it could defer delivery over the month of February while the market price continued to drop, resulting in additional profits. There is little doubt

that a long might have harbored ill will toward Apex resulting in a desire to "get Apex." Nonetheless, such a desire, even if properly evidenced, would not necessitate an inference of conspiracy; it is as consistent with independent action.

(b) *Circumstantial Evidence*

1. *Late January Purchases.* Apex claims that purchases of long positions by the defendants in late January without economic justification are evidence of a conspiracy. Apex does not contend the conspiracy existed at that point, but merely that the unsound purchases are evidence of the later formed conspiracy. On January 27, Belcher purchased 80 contracts and Warren purchased 158. On January 28, Northeast bought 331 contracts.

Northeast: Apex asserts that the late January purchases support an inference of unlawful behavior by Northeast because prior to the establishment of these long positions, Northeast had severely cut back its scheduled receipt of oil in January and February from wet market suppliers.

Belcher: Apex also claims that Belcher bought these late January contracts at a time when it was declining to accept deliveries from its oil suppliers.

Warren: Apex argues that Warren's late purchases are suspicious because none of the Warren witnesses could remember why they increased their February long position at the end of January.

Without explicitly saying so, Apex apparently believes these are "parallel acts against interest" in January that support an inference of a conspiracy in early February. Putting aside the difficult question of how purchases made *before* the conspiracy are evidence of a common scheme, Apex's presentation of the evidence omits one critical fact that makes an inference of *independent* action from the late January purchases overwhelming: The oil could be purchased at a lower price through a futures contract on the Exchange than it could under existing wet market supply contracts. The witnesses and documents of both Northeast and

Belcher establish that they could get cheaper No. 2 heating oil through a February long contract than from their wet market suppliers. The witnesses from Warren simply could not recall what their rationale as at the time of purchase. This omission is probative of nothing, particularly in light of the reasons given by Northeast and Belcher for their late purchases.

2. *Prior Practice.* In support of a conspiratorial inference, Apex contends that the actions of the six longs in nominating for delivery in the first three delivery days of February and sticking to those nominations was contrary to prior practice in the industry. This deviation from normal practice, Apex implies, when combined with parallel conduct, supports a conspiratorial inference sufficient to survive this summary judgment motion.

Apex argues that while the Exchange rules permitted a nomination for delivery on the first day after the fifth business day of the month, "it was the custom in the industry for the long and short to mutually work out the time, method and place of delivery." Customarily, it contends, the parties would agree to resolve their contracts by EFP or book transfer, a solution which required no immediate physical product. Apex claims that despite being short on 2,048 contracts for December 1981 and 4,612 contracts for January 1982, it had no problem making delivery by mutual agreement. In fact, an Apex witness estimated that one-half to two-thirds of the deliveries made by Apex in prior months had been resolved by book transfer. Apex further argues that in contracts for delivery in December 1981 and January 1982 none of the long defendants concentrated their nominations early in the month and, in fact, spread them "reasonably throughout the month."

The long defendants do not dispute Apex's characterization of their behavior as to December 1981 and January 1982 contracts. Instead they contend that Apex has inaccurately stated the custom of the industry and ignored basic economic incentives that distinguished their behavior in other months from that in February.

The price at which a long purchased February heating oil in 1982 was fixed at the time of contract formation. Thus, by the time the delivery phase was reached at the close of trading on January 29, the longs had locked in a price for their oil. This situation is critical in light of two undisputed facts: the wet market price for No. 2 heating oil was *falling* in February 1982 and this was a predictable market response as the heating season drew to a close. The price of *March* futures, known in January and February, clearly signalled the resulting natural price drop.

To a long holding a right to receive oil at a fixed price, the falling market created a powerful incentive to receive the oil and resell it before the market price fell too far. Apex's own expert has testified that in a falling market oil is most valuable to a trader at the beginning of the month, before its price slides further. Common sense dictates that if one must take the oil at some point in a month, it is most desirable when it is most valuable. Thus, in a *rising* market month, a long would naturally seek to defer receipt and avoid storage costs while watching the value of his oil rise. In a *falling* market, however, a long would take the oil and incur storage costs in the hope that these costs would be more than offset by the early sale of the oil before its price fell too far below the price paid for it through the futures contract. For example, Warren estimates that every day that receipt of its 155,000 barrels from Apex was deferred represented a decline in resale value of over $10,000 or $300,000 per month. In contrast, storage of the oil would only cost between $31,000 and $46,500 per month. The incentives speak for themselves.

This analysis highlights the fallacy of Apex's argument from prior behavior. It is undisputed that in the months of December 1981 and January 1982—peak heating months—the price of heating oil was *not* falling, but rising. Thus, the economic forces at work in February differed from those in prior months and make comparison inappropriate. On the other hand, although the March 1982 contracts were subject to slightly different delivery rules, the pattern of nominations there is instructive. In that month, 41% of the long contracts were nominated for the first two delivery days, compared with 29% for February. Even if

one controls for the fact that the March rules provided for a five day delivery "window" and the ultimate resolution of the 41% nominated is unknown, March 1982 contract delivery nominations vary significantly from those in December 1981 and January 1982 and are more consistent with the February 1982 early nominations.

The long defendants have also offered two other substantial reasons for early nomination in February which Apex's proof does not put into issue. The defendants contend some barge companies in New York Harbor were faced with a barge strike in 1982, which in early February created an incentive to seek early delivery. Additionally, representatives of Northeast testified that they intended to move oil to their New England facilities from New York and were concerned about delays due to ice and weather conditions.

Apex's attempt to demonstrate that past practice and market custom required the longs to be flexible and to accommodate short desires to defer delivery is unconvincing. By Apex's own admission, February 1982 cannot be compared with February of 1981 or 1983. There is, then, no benchmark to measure "past practice" or "market custom" in a market like that of February 1982. It is also probative that other non-defendant companies nominated large portions of their long positions for the first three delivery days of February 1982. Thus, apart from offering the conclusory statements of several market participants that "flexibility" was the practice, Apex has not demonstrated that there existed any custom or practice from which the parallel nominations of the longs in February 1982 and their insistence on those nominations was a departure and thus capable of a plausible conspiratorial inference.

It should be noted at this point that Apex has sought to control the terms of debate by lumping the individual defendants together as a monolithic group of parallel actors. Yet, the so-called conspiratorial nominations by the six longs vary greatly by date, time and method of delivery. *See* the chronology of nominations, *supra*. Also, the longs reacted differently to Apex's overtures for flexibility. The Exchange minutes record that one broker reported:

"Warren is flexible. Belcher is inflexible, but nowhere near as inflexible as Global. Global has [a] suit pending against Apex and will not be willing. They are out to bust them." Warren, in its separate reply brief, argues strenuously that it resolved its contracts with Apex amicably and without extraction of concessions.

In considering the proffered evidence intended to elevate proof of parallel action into the realm of conspiratorial inference, the Court is mindful of another controversial, but entirely lawful, incentive facing the longs. As discussed, there were serious, factually rooted rumors in the market in early February 1982 that Apex did not have enough oil to meet its obligations.

The fact that Apex might be caught without supply in the first delivery days of February presented the astute long with a possible opportunity for economic gain at Apex's expense. By nominating early and demanding delivery, an individual long stood to gain buy-out concessions or default penalties from a strapped Apex. Unless the product of concerted action, such activity is not an antitrust violation. The ability to lawfully seize an opportunity for gain, at the expense of another, is the soul of a free market. The desire to "get Apex" or "take advantage" may not be the stuff of Sunday school, but it is an engine of the marketplace. Even if each long suspected or knew the others were also moving to take advantage of Apex's shortfall, an inference of conspiratorial action does not arise without additional evidence of agreement. *Modern Home*, 513 F.2d at 110.

3. *Lack of Need.* Apex argues that the longs' lack of need for the oil is evidence of their conspiratorial action. Any analysis of this claim is closely related to that of economic incentives above. Apex's evaluations of need, even when construed in the most favorable light, simply do not tend to exclude an inference of independent action. In short, Apex's contention is that the longs demanded delivery solely to extract buy-out concessions from the oil-strapped Apex. Assuming for the moment that "need' can be defined at all in a highly liquid marketplace where traders, speculators, and marketers are all seeking a profit, the fact that several longs acted to gain at Apex's expense does not, standing

alone, tend to exclude the competing inference of independent action.

If Apex had no oil in place at GATX in early February, a single long would be able to demand concessions by sticking to delivery whether or not the others did likewise. And each long might well have expected that other smart business people would do the same, but this consciously parallel behavior does not infer conspiracy where the individual long would have the identical motive to demand delivery whether or not he had conspiratorial bedfellows. *See Modern Home; Hunt*, 465 F.Supp. 195.

The preceding discussion, of course, assumed that "need" has a meaningful definition in a market of this type. In fact, it does not. A rational economic actor always has "need" for value. In early February, even a long who had no waiting buyer for the oil could reasonably conclude that the oil in a falling market was worth more early than late, even if storage would be necessary. When it is recalled that a long could also expect value in the form of a buy-out premium from Apex, the "need" for the oil becomes self-evident. Thus, Apex's statement that "Absent a need for oil early in February, it was contrary to the economic interests of the long defendants to seek early delivery" is nonsensical.

4. *Motive.* Motive evidence in this case does not tend to exclude an inference of independent action. Apex is certainly correct in its assertion that the longs had a motive to conspire to nominate early, demand delivery, and restrict Apex's access to oil supplies in New York Harbor; the identical motive, however, also supported individual action. Either way, they stood to reap enormous gains from a squeezed Apex. Thus, in this case, motive provides no inference of conspiracy. Given the market conditions in early February, even a long with the most malevolent of intentions had the same motive to act alone or in concert in demanding delivery. In both cases, he stood to get oil at the point in time when it was most valuable to him or receive a premium buy-out from Apex.

Apex has also argued that the long defendants were motivated by greed and animosity towards Apex. It offers a hearsay statement

by Raber that DiMauro expressed his hatred for Apex. Apex's counsel has employed the word "greed" to imply nefarious conduct by the defendants. It must be emphasized that greed may be an unsavory personal characteristic, but it is also at the heart of an active and free market where more disinterested observers might call it "profit motive." As discussed above, however, it is not unreasonable to infer that the longs harbored some animosity toward Apex and that the market conditions in early February may have presented an opportunity to recoup some of the January profits Apex had earned in the zero-sum game of commodities trading. Additionally, an Apex default could result in the award of penalties, which would be paid both to the Exchange and the victimized long.

Thus, while Apex has established that the longs had ample personal and financial motive to "get" Apex, this motive evidence fails to negate an inference of independent non-conspiratorial action. Courts have traditionally been reluctant to grant summary judgment in antitrust cases because issues of motive are often central, with credibility being a key issue. *See Poller.* But in a case such as this, motive is not a delicate factual issue because a long stood to gain either by acting alone or by acting in concert.

5. *Interfirm Communications.* Apex contends that there existed a high level of interfirm communications in this case which, together with the parallel conduct of the longs, supports an inference of conspiracy. Courts have held that a high level of communications among competitors can constitute a "plus factor" which, when combined with parallel behavior, supports in inference of conspiracy. *See, e.g., In re Plywood Antitrust Litigation*, 655 F.2d 627, 633-34 (5th Cir.1981), *cert. dismissed sub nom. Lyman Lamb v. Weyerhauser*, 462 U.S. 1125, 103 S.Ct. 3100, 77 L.Ed.2d 1358 (1983); *Gainesville Util. Dep't v. Florida Power & Light Co.*, 573 F.2d 292, 301 (5th Cir.), *cert. denied*, 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed.2d 424 (1978). However, detailed analysis of the evidence presented by Apex in "shotgun" fashion reveals the inadequacy of these allegedly probative communications.

Apex's use of evidence of interfirm communications is marked by a persistent and troublesome element of circularity. Its entire presentation implies that the interfirm communications cannot be considered natural responses to common concerns, as in *Hunt*, because here the "common concern"—threat of default—was actually *caused* by the concerted effort of the longs in nominating early. Apex, the argument seems to go, would not have been in a tight spot if there had been no conspiracy; therefore these conversations are actually a response to the successful achievement of the conspiratorial objective—a "crunch—and actually constitute further evidence of the conspiracy.

But this argument has it backwards: it assumes a conspiracy first, and then sets out to "prove" it. Under *Weit*, 641 F.2d at 461, once faced with uniform sworn denials from the defendants, Apex is required to supply evidence which tends to establish a conspiracy. It may not proceed by first *assuming* conspiracy and then explaining the evidence accordingly. If Apex can present independent evidence which tends to exclude an inference that the longs acted independently, then, and only then, may it use these conversations for whatever additional evidence of conspiracy they may provide. Until it can do so, these conversations are at best ambiguous.

a. *Denihan (Northeast)—DiMauro (Triad).* On February 1, Dennis Denihan of Northeast spoke to Sal DiMauro of Triad. Apex contends that "[i]t may reasonably be inferred that Denihan transmitted to DiMauro the information as to the short position of Apex" because Wahl of Apex had told Denihan of Apex's position on Friday, January 29.

No evidence of conspiracy may be gathered from this conversation. Sal DiMauro and Triad were brokers for Northeast (as well as other of the longs) for wet market transactions and Denihan testified that *wet* market transactions were discussed. It is simply not reasonable to assume Denihan told DiMauro of Apex's short position and no basis for such an assumption has been provided. In any case, if Wahl of Apex was telling people of Apex's position, it could hardly be evidence of conspiracy if Denihan had told his broker.

b. *Beberich (Belcher) – Oliver (Northeast).* Apex alleges that on February 1, Berberich of Belcher spoke to Oliver of Northeast. There is, however, no admissible evidence that this conversation ever took place. The only proof of the conversation is a hearsay reference to Oliver's name in Berberich's notebook. Neither individual could recall the conversation.

c. *Berberich's Notes.* The alleged conversation between Oliver and Berberich is important to Apex, however, because Berberich's notebook for February 1 also contains the words: "demand delivery", "look for default", and "Merc EFP". Apex seeks to establish that Oliver spoke to Berberich and communicated the information about Apex's short position that Oliver's co-worker, Denihan, had obtained from Ed Wahl of Apex. That complicated equation would establish a link between communications about Apex's short position and Berberich's notes. The chain Apex seeks to construct is improper. There is *no* admissible evidence that Berberich spoke to Oliver, much less that he and Oliver discussed Apex and Berberich later memorialized the conversation in his notes. To infer the contrary is sheer speculation.

On February 1 Berberich also wrote in his notebook: "Saturday, demand 12:01 Saturday a.m.," which meant requesting delivery of Belcher's contracts on February 6, the first delivery day. On February 2, Berberich wrote "promote crunch" in his notebook. Construing this evidence in the light most favorable to Apex, it supports an inference that Belcher intended to demand its oil early and put pressure for delivery on Apex. It does not tie Belcher to a *concerted* effort to harm Apex.

At oral argument, Apex's counsel contended that an inference of conspiracy flowed from the small size of Belcher's holdings: How could Belcher be acting alone and hope to promote a "crunch" of hugh Apex with only 315 contracts? The fallacy in this argument is that the evidence indicates that Apex had little or no oil available for delivery at GATX on February 6, and it appears the market knew this fact. Thus, even assuming the falling market and its product needs had nothing to do with Belcher's nomination and malevolence was its sole motive, it could "crunch"

Apex. By demanding its 315 contracts during the *first minute* of the delivery period, Belcher, acting alone, could reasonably have hoped to unilaterally pressure Apex and obtain default penalties or a premium price buyout. In fact, the basis for Apex's claims against the exchange defendants is that they refused to guarantee non-delivery of a single 300 contract Stinnes nomination slated for February 6. Thus, Apex is saying Stinnes successfully squeezed Apex with 300 contracts while Belcher could not hope to do so with 315. Apex cannot have it both ways. At its worst, Belcher's behavior is as consistent with independent business behavior as with a conspiracy.

d. *Slifka (Global)—Oliver (Northeast).* On February 3, Fred Slifka of Global called Donald Oliver of Northeast. This conversation is evidenced by the notes of Northeast's Denihan, who testified that he made the notes after a discussion with Oliver concerning the conversation with Slifka. The notes read:

DAO—

Re Merc Nominations

(1) All nominations in writing

(2) If not accepted NPC to demand $100.00/contract/day penalty for five days

At end of five days window NPC to demand 10 Pct penalty + oil + go to court

(3) NPC to go to newspaper and expose Exchange

(4) All loadings must be GATX

Even assuming Oliver discussed each of these matters with Slifka, this evidence does not tend to exclude the possibility of independent action. If one first assumes a conspiracy, as Apex's presentation does, discussion of these matters seems consistent with a conversation between two conspirators. This evidence, however, does not help to *prove* conspiracy because it does not tend to exclude the inference that the items discussed were a predictable response to existing conditions. While it could be imagined that

the longs had conspired to pressure Apex, and Slifka and Oliver were merely discussing the final details of the effort, it is more likely that their conversation was a natural one between traders faced with a common concern: the possibility of an Apex default on deliveries.

Thus, in the fact of Apex shortage, it was not unreasonable for these competitors to discuss matters of common interest. Absent some showing that the content of the communications supports a reasonable inference of conspiracy, a discussion of shared concerns does not a conspiracy make. *Hunt*, 465 F.Supp. at 230-31. Mentions of default rules, written nominations, and threats against the Exchange are all consistent with a fear of default in a month when early barrels were desirable and Apex was short of oil. "All loadings must be at GATX" *could* mean the longs wanted to keep the pressure on Apex, but it is more reasonably considered innocuous in light of the fact that Apex itself had chosen GATX to make its deliveries. Significantly, Oliver later called Slifka to explicitly *reject* joint legal action by the oil firms against the Exchange. These notes may be Apex's best evidence, but they too are ambiguous and consistent with independent conduct.

e. *Slifka (Global)—Wytrzes (Warren).* On February 3, Apex contends, Wytrzes told Slifka that Warren had nominated for February 6 and that he had heard that Apex would have trouble making delivery. This conversation is memorialized by the notes of Andrew Wittenstein, an attorney for Global, who made them well *after* the alleged conspiracy terminated. Thus, even if the information in the notes constitutes an admission by Global, it is inadmissible hearsay as to the other longs because it was not made during the course of any conspiracy.

Most importantly, however, the alleged statements by Warren to Global concerning Warren nominations were made *after* Warren submitted its nominations. This makes them significantly less probative of conspiracy than if the conversation had considered nominations before they were made. Any statements concerning Apex's difficulties with delivery were natural considering the

information already in the marketplace. This evidence does not support a reasonable inference of conspiracy in light of the competing inference that Warren and Global were acting alone but were faced with a common market crisis.

f. *Slifka (Global) – Berberich (Belcher).* On February 3, Slifka spoke to Berberich. Apex's version of this conversation is restricted to discussions of whether there would be a default in the market. Again, this discussion of a common concern is simply not evidence of conspiracy. In fact, Berberich admitted that he spoke to other industry members about the rumors of default. As Judge Weinfeld noted in *Hunt*, such behavior is natural in light of the concerns shared by all long defendants. It is also important that this conversation took place *after* Belcher submitted its nominations, when the concern about default would no doubt be high.

g. *Berberich (Belcher) – Oliver (Northeast).* Berberich also spoke to Donald Oliver of Northeast on February 3. During the conversation each acknowledged that his company held a long position and had submitted nominations. This is not evidence of any conspiracy.

h. *Costikyan (Belcher) – Oliver (Northeast).* On February 3 Thomas Costikyan of Belcher called Oliver to ask if Northeast wished to share a barge with Belcher for receipt of oil on February contracts. Oliver declined. Apex observes that Oliver thought the call unusual. Berberich, on the other hand, testified that sharing had taken place before. What is most significant about this conversation, however, is that joint action was explicitly rejected by Northeast; thus an inference of *concerted* action is not supported.

i. *Slifka (Global) – brokers.* Slifka's phone records indicate that on the morning of February 4, he made calls to Triad and TIC. He also called Joel Faber and Jeffrey Atkin, floor brokers through whom Global purchased futures contracts. These individuals were *Global's brokers.* A call to them by Slifka of Global presents no evidence of concerted action.

j. *Slifka (Global)—Belcher.* Slifka's phone bill reflects a call to Belcher on the morning of February 4. This fact alone is probative of nothing.

k. *Slifka (Global)—DiMauro.* Joe DiMauro testified that Slifka called him on the afternoon of February 4 to discuss whether deliveries would be made under the February contracts. Joe DiMauro and his company were brokers for Global. Again, no inference of concerted action is presented by the conversation of a principal with his broker concerning market conditions of concern to both.

l. *Bertolami (Stinnes)—DiMauro.* Apex observes that Vito Bertolami of Stinnes was in "daily" contact with Joe DiMauro during early February. DiMauro's company was also a broker for Stinnes and communications between the broker and his client are consistent with, and essential to, independent action by the client.

m. *Eastern—DiMauro.* Apex contends that Eastern also "entrusted DiMauro with wide responsibilities for the trading of No. 2 heating oil on its behalf." This was perfectly consistent with independent action; DiMauro was Eastern's broker.

Apex's conclusion from all this is that "there existed a pattern of pervasive interfirm communications during the crucial time period when the conspiracy was conceived and implemented." The record simply does not support such a statement. Apex no doubt hopes to bring this case within the ambit of *In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981), *cert. dismissed sub nom. Weyerhaeuser v. Lyman Lamb*, 462 U.S. 1225, 103 S.Ct. 3100, 77 L.Ed.2d 1358 (1983), where the court found the pattern of interfirm communication a sufficient "plus factor" to make parallel behavior supportive of a conspiracy inference. In that case, however, the contact between competitors were not only frequent but also highly probative of conspiracy. The court observed that "[t]he parallel pricing conduct clearly demonstrated in the record plus the numerous items of direct evidence of communication between high-level personnel on pricing policy adequately support the jury's verdict." 655 F.2d at 634. The record

there contained many memoranda written by the alleged co-conspirators, explicitly detailing the discussions they had had with each other concerning pricing. As the Fifth Circuit observed, the plaintiffs had "unearthed damaging evidence from the mouths, or typewriters, of defendants' own employees." *Id.* at 633.

In the present case, once the communications between client and broker are excluded—as they must be—we are left with a total of *six* communications, (two of which are of doubtful admissibility), between the six alleged co-conspirator longs, hardly a "pattern of pervasive inter-firm communications". It is significant that *none* of the communications involved Eastern or Stinnes and only *one* involved Warren. Of the six communications, one is represented by a phone bill, one resulted in a rejection of concerted action, and two involved nothing more probative than a discussion of default—a legitimate concern of all longs.

The remaining two items are the conversation between Berberich (Belcher) and Oliver (Northeast) allegedly memorialized in Berberich's notes, and the call between Slifka (Global) and Oliver (Northeast) summarized by the notes of Denihan (Northeast). This is Apex's best evidence. As discussed, however, even assuming these two conversations are supported by admissible evidence, and the notes recording them are construed liberally, they remain ambiguous. Both can support either an inference of conspiracy or an inference of independent conduct; the former does not tend to exclude the latter. None of these inter-firm communications rise to the level of those found probative of conspiracy in *In re Plywood Antitrust Litigation*.

6. *Inquiries at GATX*. The record indicates that in late January and early February 1982, inquiries were made by long defendants about the inventory of oil at GATX, the terminal selected by Apex for delivery under its February contracts. On January 28, Northeast's Houston office told Denihan, of Northeast's New York office, that inventory was low at GATX. On February 3, Berberich (Belcher) called GATX to find out how much oil was there and how much of it was in Apex's name. He learned that GATX held 520,000 barrels and Apex's inventory was negligible.

Berberich also wanted to determine who owned the barrels on hand at GATX although he could not recall whether he ever attempted to do so.

These inquiries more plausibly support an inference of independent action than concerted effort. By February 3, Belcher knew that Apex had selected GATX for delivery of Belcher's 315,000 barrels. Berberich's investigation is perfectly consistent with a concern over Apex's ability to supply the oil. There is also no evidence that Northeast's Houston office ever asked for, or received, information about Apex's inventory at GATX. Its inquiries are consistent with a prudent attempt to understand the market supply position, particularly when Northeast held 748 long contracts and there was some question of the shorts' ability to provide oil.

An employee of GATX, Joseph Teleposky, testified that on Friday, February 5, he received telexes from some of the longs stating their intention to pick up oil at GATX the following day. He said that these were unusual. Without more, this parallel conduct is not probative of conspiracy. In light of the threat of default that had emerged by February 5, it would be expected that each long would attempt to ensure that its delivery would be protected. The record reveals other efforts by longs to "dot all i's and cross all t's" in the face of a possible default. It is certainly more plausible that each long hoped to be in a solid position to take delivery or reap the benefits that default penalties would bring.

7. *Threats to Exchange and Clearing Members.* As mentioned above in the discussion of inter-firm communications, the notes of Denihan (Northeast) reveal that his boss, Oliver, and Slifka (Global) talked to suing the Exchange or going to the press. Apex contends further that Northeast and Belcher each threatened their clearing members with legal action if their nominations were not submitted as requested.

The discussion between longs of possible action against the Exchange – not communicated to the Exchange – apart from tending to show that the Exchange was *not* a co-conspirator, does not establish anything save a discussion between two companies

faced with similar problems and worried about the enforcement of their contract rights.

Likewise, the threats to sue clearing members are not probative of conspiracy. In fact, Northeast's telex does not threaten its clearing member but instead advises the member to inform "seller", i.e. *Apex*, that failure to clear nominations will be a serious problem. Belcher did threaten *one* of its clearing members, but in the light of its concern over default, this action is consistent with independent action.

8. *Access to Supply.* As part of its conspiracy claims, Apex contends the long defendants conspired to refuse details with Apex and to encourage others to do the same. Apex offers three pieces of evidence in support of this assertion:

a. *Stinness Offer.* On February 1, Triad, Joe DiMauro's wet market brokerage firm, "offered" to sell Apex 300,000 barrels of No. 2 oil immediately on behalf of Stinnes. Apex claims that when its chief trader, Gary Parker, called Sal DiMauro of Triad to express interest in the oil, Sal DiMauro said Stinnes would sell the oil at 87 cents or 87.1 cents per gallon, but he would confirm the offer only after talking to Stinnes. Ten minutes later, Sal DiMauro called Parker back and informed him that his brother Joe had told him the barrels were not for sale. Parker testified that Joe DiMauro said "Sal wasn't supposed to be offering those barrels out for sale."

On February 2, when Wahl of Apex again asked Triad about available barrels, Sal DiMauro said 300,000 were available but at a cost of 97.5 cents per gallon. On February 3, during a meeting with Bertolami of Stinnes, Joe DiMauro called Paul Novelly of Apex and offered to sell Apex 1.5 million barrels of Stinnes oil at 93.5 cents per gallon. Apex declined that offer.

Apex asserts that the contradictory positions taken by Triad regarding the price of the 300,000 barrels is evidence of a conspiracy to deny supply to Apex. Construing this evidence in the light most favorable to Apex, it reveals only that Stinnes realized it would be foolish to sell barrels at a lower price when Apex's

shortage indicated that higher prices would be forthcoming. Stinnes had no obligation to assist Apex by selling oil to it at a low price. It is more plausible to infer from this evidence that after its first discussion Stinnes saw that Apex was in a bind and that it could get a premium for oil, and therefore ceased discussing a sale of 300,000 at a lower price, and later made a larger offer at a higher price.

Again, if, as Apex would like, one first assumes conspiracy, then this behavior may be seem as consistent with unlawful action. But this evidence is not *proof* of conspiracy because any inference of concerted action is unreasonable in light of the competing inference that Stinnes was a smart player in the market and narrowly avoided Sal DiMauro's loss of a profit opportunity.

b. *Amoco.* Through a tenuous chain of inferences, Apex argues that its inability to get oil from non-defendant Amoco to fulfill its February delivery obligations with Apex is evidence of a concerted effort by the defendants to restrict its access to No. 2 oil. Apex had contracts with Amoco for delivery of oil in January through March of 1982 and Amoco was encouraging Apex to take oil in January. Goldman Sachs & Co. told the Control Committee on February 4 that 750,000 Amoco barrels were expected at GATX in time to meet Apex's delivery obligations on February 6. But in early February, Amoco did not deliver the oil Apex expected to use to meet its futures market obligations. Apex contends that Amoco's failure to deliver resulted from the conspiracy.

Apex attempts to tie the long defendants to Amoco through two meals involving principals to Stinnes and Amoco. On January 26, Bertolami and Pat Marcello of Stinnes had lunch with Walt Buri of Amoco. Bertolami's expense vouchers reveal No. 2 oil was discussed. On January 29, Bertolami and Joe DiMauro had dinner with Buri and Dom Olsen of Amoco. Again, the expense vouchers show No. 2 oil was discussed.

Amoco agreed to deliver 400,000 barrels of No. 2 oil to Stinnes in February, with 200,000 barrels to be taken prior to February 5. Stinnes also requested an additional 400,000 barrels on an accelerated basis and sought February delivery of 200,000 barrels due in March 1982.

Apex contends this behavior "suggests" a conspiracy to restrict access to supplies. It does not, however, even rise to the level of a suggestion. Amoco witnesses testified, and Apex has offered no contradictory proof, that *no oil was owed to Apex for early February*. The Amoco-Apex contracts provided that specified amounts of oil had to be delivered in each of the months of January, February, and March, with no delivery dates specified. In this light, the meals involving Stinnes and Amoco hardly bear discussion. Subsequent events bear out that a discussion of No. 2 oil transactions, unrelated to Apex, was probable. There is no inference of conspiracy here. Finally, Stinnes' oil deals with Amoco for February simply show that it needed the oil, a fact that directly undercuts one of the main pillars of Apex's case for conspiracy—lack of need.

c. *Warren and Karam*. Apex argues that the refusal of Warren to participate in a book transfer involving Karam Petroleum Company, Warren, and Apex is evidence of a conspiracy by the long defendants to squeeze Apex by refusing to deal. Warren owed Karam Oil, Karam owed Apex oil, and Apex owed Warren oil so the obligations of all three, including those of Apex to deliver to Warren, could be wiped out by book transfers among them. Warren, however, refused to use the oil it owed Karam to offset the barrels owed to it by Apex.

There are numerous problems with Apex's proffer of evidence. First, as noted earlier, Karam himself never said Warren refused to do the transfer because Apex was involved; instead, what Apex has offered is Wahl, of Apex, reporting Karam's report of rumors that Warren was out to get Apex. These statements by Wahl are of little probative value and double hearsay.

Second, the compelling inference in this context is that Warren rejected the book transfer for proper business reasons. Karam owed Warren 15,000 barrels from January and 40,000 prompt February barrels. Prompt barrels were those due and owing immediately. By contrast, Warren owed Karam 40,000 barrels deliverable anytime in February and another 40,000 deliverable during the last two weeks of February. Warren had paid Karam

a premium to be able to obtain the barrels early in February and repay them late in February.

Thus, Warren had bargained for, and received, the right *not* to give Karam its barrels in early February and its refusal to do an early February book transfer involving Apex was consistent with this bargain. To do an early February book transfer with Karam and Apex would have been contrary to Warren's economic interest. In fact, Warren's arrangement with Karam shows the value of "early" oil to Warren and the other longs in a falling market and thus demonstrates the innocent purpose behind demanding early delivery in February.

9. *DiMauro and "hold harmless."* On the evening of February 5, Joe DiMauro had a conversation with Gary Parker of Apex on a speaker phone while Ed Wahl and Steve Wirkus of Apex listened. Apex in its brief claims DiMauro "flatly stated that he was acting on behalf of all long defendants" and that "DiMauro further indicated his familiarity with the conspiracy to squeeze Apex but, in denying his own involvement, tried to lay the blame on Sun Trading."

Apex's characterization of this February 5 conversation is highly misleading. It should be noted at the outset that this "evidence" comes from the uncorroborated accounts of the telephone conversation supplied by three Apex participants taken in depositions subsequent to the commencement of this action. The accounts (1) do not purport to be verbatim recitations, (2) contradict each other, (3) are not supported by contemporaneous memoranda, and (4) are flatly denied by DiMauro. Taken in the light most favorable to Apex, the most that can be said is that DiMauro stated he represented Global, Stinnes, Eastern, and Belcher, his broker clients, not Warren and Northeast and that whoever was "doing this," it was not DiMauro, but Sun Trading.

Apex tries to shore up its argument that DiMauro was aware of a conspiracy on February 5 by arguing that on February 6, he attempted to obtain a "hold harmless" agreement from Apex on behalf of himself and his clients. Apex's use of the request for

a hold harmless is inappropriate for two reasons. First, it is undisputed that Parker threatened DiMauro during their conversation on February 5. Second, Parker, the only Apex employee who heard both sides of the February 6 conversation, testified that DiMauro made the request solely on his own behalf. While Wahl and Wirkus evidently felt differently, Parker, the only person on the Apex end of the phone, did not understand DiMauro to be seeking a "hold harmless" on behalf of any long. These two facts support a strong inference of independent, and prudent, action by DiMauro in seeking a "hold harmless" agreement for himself.

10. *Inventory Transfers.* Apex argues that the nominations by Warren and Global for inventory transfers at GATX when neither company had storage there is evidence that the long defendants pressured Apex and drove up the price of oil. It is true that Warren had no agreement with GATX in February 1982 for storage. Two Apex witnesses testified, however, that spot storage was available at GATX and not unusual. Inventory transfer would not require separate storage space. Wentworth of Warren testified that Warren would usually wait to arrange spot storage until it was certain storage was needed. Taking the oil by inventory transfer also made sense for a New York area trader such as Warren because the nomination could be passed to others at GATX, thus saving transportation costs. In any case, as Atkin told the Control Committee, Warren was flexible as to delivery, and in fact ultimately did agree to defer delivery and take the barrels by book transfer. Warren's conduct is consistent with independent, rational business behavior.

It is also true that Global had no regular storage space at GATX and no significant marketing operations in New York. Global, however, often traded in New York, and leased storage space. Slifka of global testified that he arranged to lease some of Stinnes' storage space when he learned from his broker, DiMauro, that it was available. There is nothing in this activity that supports an inference of concerted action.

11. *Vessel Nominations.* Apex contends that an inference of conspiracy can be drawn from the designation by Northeast of vessels

that would not be available at GATX at the appointed times. None of this evidence is probative of conspiracy.

a. *AMERICAN HAWK.* On February 2, Northeast nominated to take 200,000 barrels of No. 2 oil aboard the tanker American Hawk on February 8 at 8:00 a.m. Apex observes that the tanker needed to discharge ballast before receiving oil, but GATX could not receive pumped ballast. Denihan's notebook also reflects that the barge would not be in New York until noon on February 8 and Northeast never amended its nomination to reflect this change.

There are two problems with this evidence. First, the record indicates that the American Hawk's ballast could have been pumped at sea onto another barge. Second, Denihan's notebook entry is ambiguous, but even if construed as Apex urges, it is not probative of conspiracy. The Exchange rules provide that Northeast could have changed its nomination to receive the oil on the AMERICAN HAWK when it was ready to load. Even assuming Denihan knew the barge would be late, a four hour delay in 200 out of 748 contracts is hardly suspicious, no less probative of conspiratorial behavior. Certainly Northeast could also have told Apex of the delay before February 8. This never came to pass, however, because Apex and Northeast settled on February 5.

b. *SONAT 81.* Denihan's notebook reflects that the SONAT 81 barge, nominated to pick-up Northeast oil on February 10, 1982, was to leave Northeast's system on January 30, 1982. Apex contends that because the barge was given back to Sonat, its nomination for February 10 was bogus and suspicious. This nomination was not only outside the "window" of conspiracy, which Apex represented at oral argument to have ended on February 8, but Northeast also settled with Apex on February 5, thus obviating the need for the barge. There is no evidence in the record that the barge could not have been chartered for February 10. Indeed, an employee of Sonat testified that the barge was available on short notice.

c. *INTERSTATE 70.* Charles Rose, of Sonat, testified that the INTERSTATE 70 barge could not make the three round-trips between GATX and New Haven, Connecticut within the time-frame of Northeast's nominations. Mr. Rose's qualifications to comment on the ability of a barge to make round trips between GATX and New Haven are unclear. Nor is it clear what hypothetical facts he assumed. But even if the Rose testimony is taken at face value, it is probative of little other than that Northeast's schedulers were less than perfect. The three scheduled pick-ups at GATX were for February 6, 8, and 10. As noted, any nominations for delivery after February 8 would occur after the alleged conspiracy. The fact that in scheduling the INTERSTATE 70 pickup on February 8 Northeast might have overestimated the barge's speed in making the New Haven run is not evidence of conspiracy.

In a strange twist, Apex also asserts evidence of conspiracy arises from the fact that Belcher paid to hold the OCEAN 262 on standby from February 2 until February 5, when it settled with Apex. With Belcher witnesses admitted that this was unusual, it is consistent with the possibility that the barge might have been needed to take delivery and is not probative of any conspiracy. Thus, we see Apex offering as evidence of unlawful action *both* the failure to have barges available by Northeast *and* the maintaining of a ready barge by Belcher. This contradiction speaks for itself.

(5) *Overview*

[3] The detailed review of each piece of evidence in this case was essential because of the amount of material presented by Apex. When faced with that mass of material, offered in an amorphous manner, there is a strong temptation to conclude that "something" illicit must have gone on. Even innocent explanations of each individual piece can seem somehow suspicious when a mountain of material must be confronted. Matters are further confused by the fact that many of the actions and statements by defendants would make sense in the context of a conspiracy. They do not, however, tend to *prove* a conspiracy. They are equally consistent with independent non-conspiratorial action. Apex's

presentation of this case depends on the hope that it can seize the high ground and start from a premise of concerted action. The law, however, requires that, once met with sworn denials from the defendants, *Apex* must demonstrate a material issue of fact by supplying significant probative evidence tending to exclude an inference of independent action. As the Supreme Court made clear in *Interstate Circuit*, denials under oath by the alleged conspirators present a major hurdle to any antitrust plaintiff. The inference of conspiracy found in *Interstate Circuit* was due in part to the *failure* of the principals of the defendants to deny their involvement. 306 U.S. at 225-26, 59 S.Ct. at 473-74.

[4] Similarly, Apex may not prove conspiracy by hearsay admitted under a co-conspirator exception without first establishing the existence of a conspiracy by independent non-hearsay evidence. Again, Apex may not presuppose a conspiracy and work backwards. An illustration of Apex's attempt to turn the case on its head is the argument by Apex that the disparity among nomination dates, times, and delivery methods "only goes to establish what a skillfully thought out conspiracy it was . . . . " This type of "Catch-22" reasoning is plainly inappropriate. In fact, there is not a scintilla of evidence that any longs jointly considered the details of their individual nominations.

DiMauro is the focus of Apex's attention because, as a broker for Global, Stinnes, Eastern, and Belcher, he is the closest thing to a link between the longs. "Yet, the mere opportunity to conspire, even in the context of parallel business conduct, is not necessarily probative evidence." *Weit*, 641 F.2d at 462. There is no probative evidence of DiMauro's participation which tends to exclude the inference that he was simply present and acting as a broker for his clients.

When the evidence in this case is taken piece by piece, it does not add up to a triable case because the sum of zeros is still zero. Viewed as a whole, the case also fails to supply an inference which is reasonable in light of the powerful inference of independent response to existing economic conditions. At its best, the evidence offered tends to establish that each long defendant, matched with

a short without product in a month of falling prices, decided that it stood to make the most profit by demanding its oil in the first three delivery days of February 1982: Either prompt and valuable oil would result, or a premium buy-out with possible default sanctions against Apex would be gained. This business decision, which lies at the heart of the long defendants' actions, does not require, nor does it imply, a conspiracy.

Accordingly, summary judgment is granted to the long defendants on Claims I-IV.

COMMODITIES MANIPULATION: CLAIM V

Apex's fifth claim alleges manipulation of the futures market for No. 2 oil in violation of the Commodity Exchange Act ("the Act" or "CEA"), 7 U.S.C. § 13(b), which makes it unlawful:

> for any person to attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market . . . or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce.

Section 13c(a) of 7 U.S.C. imposes liability as a principal on any person: (1) "who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions" of the Act; (2) "who acts in combination or concert with any other person in any such violation"; or (3) "who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions" of the Act.

Apex's claim under the CEA has two elements. First, it alleges that the long defendants manipulated the futures market for

No. 2 oil in February 1982 by creating or exploiting a "squeeze" and forcing Apex to purchase oil at inflated prices. Second, Apex alleges that the long defendants communicated false reports in violation of the CEA. (Although the amended complaint includes the exchange defendants within the claim of manipulation, Apex has not argued that Raber or the Exchange were party to any manipulation.)

1. *Manipulative Scheme*

Apex's claims for manipulative activity under the CEA are virtually coextensive with those for conspiracy. Specifically, Apex alleges that the defendants unlawfully manipulated by:

— conspiring to nominate for early delivery of their No. 2 oil, with knowledge that Apex could not physically satisfy the nominations;

— limiting Apex's access to No. 2 oil in New York Harbor during early February;

— conspiring not to deal with Apex for No. 2 oil in the first week of February; and

— agreeing not to modify their delivery nominations.

[5] Apex contends that these activities violated Section 9(b) of the CEA because they constituted conduct "intentionally engaged in which resulted in a price which does not reflect basic forces of supply and demand", *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir.1971), *cert. denied sub nom. Cargill, Inc. v. Butz*, 406 U.S. 932, 92 S.Ct. 1770, 32 L.Ed.2d 135 (1972), and that the long defendants acted together to either create, or unlawfully take advantage of, a "squeeze" on Apex. A "squeeze" is characterized in *Cargill* as a situation where "deliverable supplies of the commodity in the delivery month are low, while the open interest on the futures market is considerably in excess of the deliverable supplies." *Id.* at 1162. For a manipulative "squeeze" to be created, however, "market dominance" by the defendant or defendants is needed because "a squeeze cannot be successfully executed unless a long has sufficient control of enough futures contracts to force the shorts to come to him to settle their contracts." *Id.* at 1164.

There is considerable dispute in this case over the existence of a squeeze, the causes of the squeeze if one existed, and the market dominance of the accused longs. But since it is not disputed that no individual long alone possessed "market dominance," Apex must rely upon concerted action to prove a manipulation. Thus, the Court need not reach difficult questions of intent, market condition and market dominance that have troubled courts in manipulation cases. Apex has failed to present evidence that raises a material issue of fact as to a conspiracy to do *anything* among the defendants. *See* antitrust discussion, *supra*. Without a conspiracy, there can be no manipulation in this case and, therefore, summary judgment must be granted to the long defendants on that portion of Claim V alleging unlawful manipulative activities.

2. *False Reports*

Apex asserts the long defendants are liable under the CEA for proliferation by them and their brokers of "false or misleading or knowingly inaccurate reports." Apex, however, has failed to supply even the rudimentary details of the evidence upon which it bases this claim. The specific statements have never been cited by Apex or supported by admissible evidence, nor has Apex explained the relationships between the long defendants and any speaking brokers. Apex has not demonstrated who made what statements on whose behalf. In a brief footnote, Apex merely asserts that the "misrepresentations made on behalf of one of the long defendants are binding on all of the participants in this conspiracy. *Pinkerton v. United States*, 328 U.S. 640 [66 S.Ct. 1180, 90 L.Ed.2d 1489] (1946)." By once again lumping evidence and defendants together, Apex apparently hopes that the Court will *assume* something nefarious must have taken place. There are, however, numerous problems with Apex's approach.

The first difficulty on this "reports" claim arises because Apex has not raised a material issue as to conspiracy. Thus, the Court cannot treat the remark of one long or one agent as binding all co-conspirators. Instead, the Court is left without any framework in which to evaluate the alleged statements: Not only have no

actual statements been presented by Apex, but also there is no way to determine on whose behalf any brokers made statements.[2] This is a critical failing because, in addition to claiming that some longs themselves made statements, Apex relies on two alternative theories of liability to hold the longs for remarks by brokers: aider and abetter liability under Section 13(a) of the CEA, and traditional agency principles. Thus, in the absence of a conspiracy, the Court is unable to analyze these claims in any meaningful way and Apex has therefore failed to demonstrate a genuine issue of material fact as to liability for any false reports or statements.

[6] Even assuming (1) specific statements, (2) by specific actors, (3) tied factually and legally to specific defendants, Apex's claim of manipulation by false statement must fail. Taking the alleged unlawful statements from Apex's answers to contention interrogatories, they may be organized into four general categories: "Apex does not have the oil," "Apex could not make delivery," "Apex would default," and "Apex was going to get their's." Even if these types of statements are somehow considered "reports" involving "interstate commerce," they are at most rumors, predictions, and opinions characteristic of a vibrant futures market and could easily have been prompted by legitimate concerns about Apex's ability to meet its obligations on the February contracts. In the context in which they appear, they are not actionable misrepresentations.

Without addressing how the foregoing statements could be actionable, Apex asserts broadly that "false statements are actionable misrepresentations when they are made in bad faith or with intent to deceive." Even assuming such statements as these to be actionable if made with the requisite malicious intent, Apex has proffered no evidence of that intent. Conclusory allegations are

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[2] In a disingenuous footnote, Apex asserts: "At least for purposes of this motion, the existence of these false or misleading statements has been conceded. *See* Long Defendants' Statement Pursuant to Rule 3(g), ¶ 79." Apex mem. at 157 n. 6. That 3(g) statement, however, simply summarizes Apex's contentions concerning the statements. It does *not* concede the existence of the statements.

plainly insufficient at this stage of the litigation. Summary judgment is required on this portion of Claim V as well.

FAILURE TO REGULATE: CLAIM VII

(1) *Introduction*

Apex claims the Exchange and Raber violated the CEA, 7 U.S.C. §§ 7(d) and 7a(8), by failing to remedy the market manipulation by the longs in February 1982. It contends that, with knowledge of the manipulative conspiracy, they chose not to exercise statutory authority to preserve a fair market and help Apex. This behavior was allegedly intended by the Exchange "to protect its own self-interest and the self-interest of its vice chairman, defendant Raber," and avoid a "loss of investor confidence."

Apex's claim for failure to regulate under the CEA faces a major hurdle which it has failed to surmount. Only bad faith conduct by the exchange defendants is actionable under the CEA. Bad faith arises "when self interest or other ulterior motive unrelated to proper regulatory concerns is alleged to constitute the sole or dominant reason for the exchange action . . . even though the action was not beyond the bounds of reason." *Sam Wong & Son, Inc. v. New York Mercantile Exchange*, 735 F.2d 653, 677 (2d Cir.1984). Apex has the burden at trial of proving this bad faith. Since the exchange defendants have denied any such behavior and point in their briefs to the absence of any factual issue, Apex must demonstrate the existence of a genuine issue of material fact as to whether the exchange defendants acted in bad faith. Since Apex has failed to do so, summary judgment must be granted in favor of the exchange defendants.

(2) *Facts*

At the risk of some repetition, it is worth setting forth separately those facts applicable to the exchange defendants' motion.

The Exchange's first involvement in the market crisis came on February 3, when floor broker Jeffrey Atkin told the Exchange's Control Committee (the "Committee"), chaired by Richard

Helfer, that "he had learned from industry sources that Apex did not have oil to deliver to his customers," and that "one or two of his customers were out to get Apex." That same day, Apex's clearing member, Goldman Sachs, assured the Committee that Apex would have oil available to keep GATX pumping continuously for several days.

Coincidentally, on February 3, 1982 the Exchange's board of governors also met to approve revisions in the delivery rules for No. 2 oil contracts. The new rules had three provisions that Apex considers significant. First, they would allow longs to designate a five day period, or "window," during which delivery would be effected. Rule 150.09(A)(2)(f). Second, the new rules would require all longs to give shorts 72 hours notice of any proposed delivery. Rule 150.09(A)(3). Third, the rules would permit shorts who were unable to clear delivery by the original delivery method to submit revised delivery instructions. Rule 150.09(A)(4)(b).

In a memorandum to the Commodity Futures Trading Commission accompanying the proposed rules, the Exchange governors wrote that the new rules "formalize the Exchange's current delivery procedures." From this Apex argues that the Exchange was aware that mandatory early delivery on a futures contract was contrary to existing practice.

The Committee met again on February 4 with a new acting chairman, defendant Raber. Helfer had stepped down on advice of counsel because one of his clients on the Exchange held a futures position for No. 2 oil in a later month. Raber, a metals trader, had no relation to No. 2 oil contracts. It was at the February 4 meeting chaired by Raber that Goldman announced Apex had 750 contracts coming from Amoco to GATX and another 400 contracts owned by, or owed to, Apex at GATX. By this time, the Committee knew that longs had nominated 657 contracts for February 6, 50 for February 8, and 70 for February 10.

Later on February 4, the Committee met again to hear Goldman state that the Amoco oil had been held up, but would be at GATX on February 5 or 6. Goldman was informed by the

Committee that assurances were needed by February 5 that the oil would be in place. After the Goldman presentation, the Committee and its staff met with clearing members representing longs matched with Apex. Timothy Bishop of Apex was also contacted and told of the seriousness of the situation and the possibility of penalties. The Committee then sought to verify the nomination dates submitted by the longs and determine whether there was any flexibility as to the dates requested.

The notes of Committee member and Exchange Vice President for Compliance Patrick Thompson reveal that at the February 4 meeting the Committee considered the declaration of an emergency, the fixing of a price by the Exchange, or the changing of delivery times and sites. None of these measures were adopted.

On February 5 the crisis deepened when Goldman announced to the Committee that the "[p]roblem is worse than we thought last night." Goldman stated that it had told Apex to "get moving to talk with actual longs to work out flexibility." Goldman told the Committee that only 127 contracts could be ready at GATX and, later that day, that apex could actually deliver only 60 to 85 contracts at the terminal, and the Amoco oil would *not* be available for February 6, 7, and 8.

On February 4 and 5, the Committee also met with clearing members representing longs matched with Apex and urged them to change delivery times and sites. The Committee told both the long clearing members and Goldman that "if it [were] determined that any clearing member, long or short, intended to defame or cause intentional problems to the Exchange and the commodity industry as a whole, the Exchange will bear down on that clearing house."

By the close of business on February 5, all Apex contracts nominated for delivery on February 6 had been resolved except one 300 contract nomination by Stinnes through its clearing member, Conticommodity Inc. ("Conti"). Edward O'Shaughnessy,

an employee of Conti, appeared before the Committee on February 5 to discuss the nomination but told the Committee he had no authority to resolve it. Instead, he referred the Committee to TIC, Stinnes' broker for the 300 contracts.

Raber asked O'Shaughnessy to arrange a meeting between himself and a representative of TIC so that Raber could discuss the outstanding 300 contract nomination. Raber agreed to meet defendant DiMauro, President of TIC, that evening at the Market Bar restaurant in the lobby of the World Trade Center, downstairs from the Exchange offices.

Both Thompson and Helfer were opposed to such a meeting. Helfer told a meeting of Committee staff members and Raber that he "could not condone anything that [was] being done at that point." According to Thompson, Helfer angrily added that "You are all going to jail, you can't do this . . . these people are taking us to the cleaners and you are going to jail if you agree to what they are trying to make you do . . . . You know what is going on around here, they are making people pay 97 cents for oil." Helfer then wrote out the following statement which he asked Raber to sign: "Please be advised that Richard Helfer bears no responsibility for any decision made on behalf of the Control Committee regarding difficulties concerning the delivery of the Feb. 1982 heating oil contract." After Raber signed the paper, Helfer left.

Raber met with Di Mauro at the Market Bar restaurant. Both testified that Raber urged DiMauro to work out the nominations with Apex and told him that default was in no one's interest. After the meeting with Raber, DiMauro spoke with Parker of Apex to discuss possible resolution of the 300 contracts nominated for February 6, the next day. Their discussion was hostile and unproductive.

Also on February 5, Goldman raised technical objections to the Stinnes nomination with the Exchange. It claimed the nomination was invalid because (1) on February 4, when the nomination came in, the Exchange told Goldman not to worry

about it; (2) the inventory transfer method of delivery requested was not a recognized method under the Rules; (3) Stinnes had failed to "confirm the availability of the method of delivery from the seller" prior to filing its delivery instructions.

That same evening, at a meeting of the Committee, Raber spoke to O'Shaughnessy of Conti. O'Shaughnessy testified that at one point during the meeting, Raber exclaimed something similar to: "I don't give a F— about you, all I care about is the exchange and my son coming into my business."

The Committee's discussion of the 300 contract nomination continued until after midnight on February 5. Seevers of Goldman testified that the Exchange told Goldman that resolution would be deferred until Monday, February 8. Seevers called Apex and told them no delivery on the nomination would be required over the weekend.

Rosemary McFadden of the Exchange testified that on Saturday morning, February 6, Richard Leone, President of the Exchange, notified Daniel Amstutz of Goldman that if the 300 contract nomination was not satisfied that day and the Exchange denied the objections on Monday, February 8, the Exchange might determine that Apex had been delinquent and was subject to penalties. McFadden herself called Bishop of Apex on Saturday and told him that "the delinquency clock could be running." Applicable penalties included: (1) a delinquency penalty of $100 per contract per day (up to five days) to be paid to the opposite party, and 10% of the contract value per day (up to five days) to be paid to the Exchange; and (2) liquidated default damages payable to the opposite party of 10% of the contract value. Rules 150.15(A)(2)(a)(b), (B)(2). On February 6, Apex settled with Stinnes by entering into an EFP at a price of 97.5 cents per gallon. *Both* Apex and Conti were left angry with the Exchange.

Apex claims that the evidence demonstrates that the Exchange and Raber were aware of a conspiracy against Apex. Notes that Patrick Thompson made at the Committee meeting of February 5

contain the word "longs" beside the word "collusion." As discussed above, Patricia Lyons of Apex recorded that Raber told her on February 10 that he was aware of a "conspiracy (Lyons' term) to 'squeeze the shorts.' " Finally, in a memorandum dated February 17, Apex employee Bryant Foster reported that on February 10, Raber used the words "sting," "collusion," and said some longs had been "out to get Apex."

(3) *The CEA Claim*

Apex must come forward with evidence tending to prove not merely that the Exchange and Raber erred or even acted in part from some improper motive, but that "self interest or other ulterior motive unrelated to proper regulatory concerns" was the "sole or dominant" reason for their actions. *Wong*, 735 F.2d at 677. As the late Judge Friendly pointed out in *Wong*, "if the governors sincerely and rationally believe their action is in the public interest, there should not be liability simply because the action has the incidental effect of advancing their private interests or damaging someone whom they do not like." *Id.*

Apex appears to level the following charges against the Exchange and Raber:

(1) The Exchange acted in pure self-interest to avoid a loss of investor confidence like that which accompanied the 1976 "Potato Fiasco" which self-interest gives rise to an inference of bad faith;

(2) Raber exhibited his bad faith when he made a statement that could fairly be construed as declaring that his actions were based on a desire to preserve his business and ensure that his son would inherit it;

(3) Raber and the Exchange, with knowledge of the conspiracy to squeeze Apex, refused to interpret the rules to allow Apex to defer delivery and thus contributed to the manipulation; this refusal was so irrational as to give rise to an inference of bad faith.

While it is true that " 'bad faith' cannot be defined with mathematical precision and an ultimate definition depends upon

the facts and circumstances of a particular case," *Mitchell v. Hercules, Inc.*, 410 F.Supp. 560, 568 (S.D.Ga.1976), the facts recited above amply demonstrate that Apex has failed to raise any issue as to whether bad faith was the sole or dominant motive of either the Exchange or Raber in the first week of February 1982. We turn to each claim.

[7] (1) *Investor confidence:* This allegation does not merit lengthy discussion. Action to preserve investor confidence is action to preserve the integrity of the marketplace and is in the public interest. The mere fact that the public interest and the Exchange members' interest are parallel does not support an allegation of bad faith: "Should a governor vote in favor of . . . a rule in the belief that the rule serves the public interest, even if also in the expectation and hope that it would serve his personal interest, his behavior would not give rise to liability." *Bishop v. Commodity Exchange, Inc.*, 564 F.Supp. 1557, 1562 (S.D.N.Y. 1983). Here, the exchange defendants could not maintain investor confidence in the Exchange and its market without also maintaining the value of their interests in the Exchange: "If such a degree of self-interest were allowed to demonstrate bad faith, then Exchange board members involved in futures markets would inevitably be subject to bad faith charges and the concept of Exchange self-regulation would be undermined." *Wong*, 735 F.2d at 672.

It is also significant that once Governor Helfer wisely stepped aside, no member of the Control Committee had a personal stake in any heating oil contracts. Thus, the bad faith claim is even weaker here than in *Wong*, where the exchange governors were alleged to have a personal interest in the contracts at issue.

(2) *Raber:* The much-quoted Raber statement that "I don't give a F— about you, all I care about is the Exchange and my son coming into my business," is not inconsistent with action to protect the public interest. The fact that the statement was made to representatives of the longs and not Apex is further evidence of Raber's desire to protect the marketplace. In a memorandum of questionable admissibility, Bryant Foster of Apex recorded that

Raber also stated he had chosen not to convene a meeting of the Exchange Board of Governors because he hoped to avert any action which would trigger default and a repetition of the fiasco the Exchange had experienced in the potato futures market in 1976. These facts, if true, do not create a genuine issue as to whether Raber was prompted by an ulterior or self-interested motive that was inconsistent with action taken in the public interest.

(3) *Irrationality:* Apex's fall-back position on bad faith is derived from a footnote in *Wong*. There, the court observed that conduct which lacks "a minimal requirement of some basis in reason" may lead to an inference of bad faith. 735 F.2d at 678 n. 32. Apex contends failure to "police price manipulation, accomplished with the knowledge that one half the market had conspired against the other, rise[s] to the level of irrationality sufficient to support an inference of bad faith."

As discussed above, there is insufficient probative evidence either of a conspiracy to manipulate or that the exchange defendants knew of any such conspiracy. The statements of Raber, offered by Apex, are misconstrued and made after any alleged conspiracy ended. What Raber may have thought after all was said and done does not establish the state of his knowledge on February 5 and 6. Helfer's emotional statements are of little evidentiary value, particularly in light of the fact that he admittedly had an interest in heating oil contracts.

Moreover, the evidence actually demonstrates that the conduct of the exchange defendants, whether or not wise in hindsight, had ample basis in reason. The record shows that the Exchange was concerned about the delivery situation in early February and received untrustworthy assurances from Goldman that Apex could make the required deliveries at GATX. When the truth became known on February 5, the Exchange faced a crisis and considered all possible reasons for the market difficulties: (1) manipulation by *Apex*, (2) a natural congestion, or (3) conspiracy by longs. The Control Committee then decided on a policy of mediation or "jawboning."

Representatives of the Exchange had numerous meetings with both sides in an effort to ease the crisis and succeeded in resolving all outstanding February 6 nominations by the evening of February 5 with the exception of the Stinnes 300 contract nomination. Apex's obligations were clear on February 6 when the Exchange's President Leone told Apex that it should honor the Stinnes nomination or risk severe penalties if its objections to the nomination were overruled on Monday, February 8.

Apex quarrels with the Exchange's refusal to declare an emergency and give Apex a way out on the single nomination of 300 contracts. In light of the fact that many thousands of contracts were outstanding in future months, the Exchange had every reason not to shake the confidence of investors, (which Apex contends they were trying to preserve), by taking extraordinary measures over a 300 contract nomination. Instead, the Exchange took steps to resolve the outstanding delivery obligation through negotiation.

[8] Apex's contention that the Exchange acted irrationally by not adopting Apex's interpretation of the rules is without merit. Construing the evidence in the light most favorable to Apex, the Exchange simply read ambiguous rules in a manner unfavorable to Apex. While it may have been possible, and even customary, for deliveries to be "flexible" and deferred by agreement, any such agreement was entirely voluntary under the rules. And, as discussed earlier, any prior practice of deferring delivery is of little probative value where, as Apex admits, September 1981 to February 1982 was a unique period and February was the only month within that period with falling prices and a significant number of early nominations. While the Exchange may have refused to give Apex all desired assurances, it actually acted to help Apex under the rules by jawboning the longs into accepting proposals for EFP's and deferred delivery.

The longs contend that Apex amassed a huge unliquidated short position in February heating oil contracts and thus ran the risk that the Exchange would enforce the existing rules by their

terms and allow longs to insist on the honoring of their nominations. Apex, they argue, played this high-stakes game in the hope that if the crisis went too far the rules would be turned its way. It is not necessary to accept this persuasive argument for the Court to conclude, taking the probative facts in the light most favorable to Apex, that Apex's true quarrel with the Exchange is that it failed to interpret the rules as Apex would have liked. This does not raise an issue of bad faith.

Apex's brief is marred by vicious and unwarranted personal attacks on Raber which are apparently designed to convince the Court that he was a loose cannon, acting irrationally and in bad faith. These irrelevant and unprofessional references to Raber's drinking only serve to raise an inference that Apex is blowing smoke in the fervent hope that the Court will assume the presence of fire. Summary judgment is granted to the Exchange and Raber on Claim VII.

ANTITRUST AND THE EXCHANGE DEFENDANTS

Apex's antitrust claims against Raber and the Exchange are "that these defendants, through their actions and inactions during February 1982, made what was only an attempted price fixing conspiracy a successful reality. The success of the conspiracy depended materially on the Exchange's and Raber's decisions to do nothing to stop it." In short, Apex believes the exchange defendants are liable for their "knowing acquiescence in the larger conspiracy" of the long defendants and their nonfeasance in not calling it to a halt.

This claim may be disposed of quickly. The Court has alredy concluded that summary judgment must be granted on Apex's conspiracy claims against the long defendants. Thus, there was no conspiracy for Raber and the Exchange to acquiesce in and summary judgment must be granted to them on any antitrust claims.

[9] Even if a conspiracy among the long defendants had been satisfactorily established, Apex has still not pointed to evidence

raising a material factual issue as to whether Raber or the Exchange joined it. Put another way, in the face of explicit denials by the defendants, Apex has failed to meet its burden of producing significant probative evidence which tends to exclude the inference of independent non-conspiratorial action on the part of the Exchange and Raber. *Matsushita*, 106 S.Ct. at 1357.

Apex contends that the evidence of frequent communications between the exchange defendants and the conspirators "strengthens the inference of conspiracy and provides another genuine issue of material fact for proper resolution at trial." This argument is without merit.

Membership in a conspiracy may not be inferred from mere association. As Judge Weinfeld of this court has written:

> It is black letter law that to hold one as a participant in a conspiracy, he must by word, deed or conduct intentionally join the illicit enterprise; mere association with conspirators and presence at the scene of a conspiracy, even coupled with knowledge that wrongful conduct by others is being engaged in, are not by themselves sufficient to support an inference of knowing and intentional attachment to an illegal enterprise.

Hunt v. Mobil Oil Corp., 465 F.Supp. 195, 231 (S.D.N.Y.1978) (footnote omitted), *aff'd mem.*, 610 F.2d 806 (2d Cir.1979). Raber and the Exchange had numerous communications with *both* Apex and the longs in their "jawboning" effort to resolve the difficulties in the first week of February. The concern of the exchange defendants that the potato fiasco not be repeated is not probative of conspiracy; rather it demonstrates a desire to *avoid* conspiracy. In this regard, it is also significant that the exchange defendants had no imaginable motive to conspire to manipulate their *own* market.

The fact that the exchange defendants may have known that certain longs disliked Apex simply does not infer an acquiescence by them in a concerted plot. On the contrary, discussions by

various longs of possible threats of legal action or public attacks on the Exchange – offered by Apex as evidence of conspiracy by the longs – tends to disprove any conspiracy between the longs and the Exchange. In sum, Apex has presented no evidence that is inconsistent with independent action by the exchange defendants to resolve a troublesome market crisis. Construing the facts in the light most favorable to Apex, there is no genuine issue of material fact as to participation by Raber and the Exchange in a conspiracy in February 1982 and accordingly, summary judgment as to them on any antitrust conspiracy claims must be granted.

Finally, even if there had been a conspiracy and the Exchange defendants joined it, there is no evidence of the required bad faith. *See P.J. Taggares Co. v. New York Mercantile Exchange*, 476 F.Supp. 72 (S.D.N.Y.1979); *see also* the discussion of the absence of bad faith conduct by Raber and the Exchange, supra.

[10] Apex argues that, whatever the case under the CEA, bad faith is not a prerequisite to antitrust liability of the exchange defendants. It is sufficient for present purposes to note that the Court agrees with Judge Weinfeld that a charge of bad faith "is essential when the conduct complained of, as here, is closely related to the exchange's performance of its statutory duty to maintain a fair and orderly market." *Id.* at 78. This requirement is essential for two reasons. First, commodity exchanges often must make it their business to impose a price on the market and impose restraints to alleviate market disputes. Lowering the antitrust plaintiff's "bad faith" threshold, coupled with the threat of treble damage liability, would inhibit proper Exchange regulatory action necessary to maintain an orderly market.

Second, the bad faith requirement in the context of CEA claims would make no sense in the absence of a similar standard in the antitrust area. The result urged by Apex would allow plaintiffs to circumvent the CEA by recasting disputes with exchanges under that act in terms of "restraint of trade" – a term easily applied since the exchange regulates an active market.

Accordingly, summary judgment is granted to the Exchange and Raber on all antitrust claims.

COMMON LAW FRAUD: CLAIM VIII

In its eighth claim for relief, Apex alleges that the long defendants fraudulently represented to Apex (1) that their decision to nominate a large percentage of the No. 2 oil due them on the first three delivery days on the February 1982 Exchange contracts was a result of each long defendant's independent decision based upon valid business reasons and (2) that the nominated delivery dates were chosen for legitimate business reasons. Apex claims that in justifiable reliance upon the misrepresentations it paid excessive prices to the long defendants for the No. 2 oil in order to meet its obligations under the February contracts.

At a trial, Apex would have the burden of proving fraud by clear and convincing evidence. *Ajax Hardware Manufacturing Corp. v. Industrial Plants Corp.*, 569 F.2d 181, 186 (2d Cir.1977). This "clear and convincing standard of proof should be taken into account in ruling on summary judgment motions . . . . " *Anderson v. Liberty Lobby, Inc.*, __ U.S. __, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).[3] While *Anderson* does not authorize a trial on affidavits, a Court must consider the substantive evidentiary standards in deciding whether the case requires submission to a jury. *Id.*

In order to prove its fraud claim, Apex must establish (1) that the defendant made a false representation of a material fact; (2) that the defendant intended to deceive Apex; (3) that Apex justifiably relied upon the misrepresentation and (4) that Apex was injured as a result of such reliance. *Indees v. American University of the Caribbean*, 546 F.Supp. 1342, 1346 (S.D.N.Y.

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[3] *Anderson* arose in the context of libel litigation; however, the Supreme Court's holding applies to "all litigants regardless of the substantive nature of the underlying litigation." *Anderson*, ____ U.S. at ____ n. 1, 116 S.Ct. at 2515 n. 1 (Brennan, J. dissenting); *but see* ____ U.S. at ____, 106 S.Ct. at 2520 (Rehnquist, J. dissenting).

1982). Apex contends (1) that the longs' "need" for oil was falsely represented to Apex by the nominations made on February 2-5 and in telephone conversations, and (2) the longs' intent to adhere to their early nominations was falsely represented to Apex in telephone conversations.

[11] First, there is no evidence in the record before the Court to support a finding that a nomination is a representation of "need." A nomination, as defined by the rules of the Exchange, is merely the giving by the buyer "of written delivery or loading instructions to the seller." Rule 150.09. Every buyer is required to make such a nomination whether or not it needs the oil. The reasons underlying the purchase and nomination may vary: the buyer may need the oil for its own use, or to trade with others to mitigate potential losses in a falling market, or it may seek to reap a profit from taking advantage of a known or rumored overextended seller. Whatever the reason for the purchase, the nomination itself is not a representation of "need" for the oil.

The other claimed misrepresentaations were statements allegedly made by telephone by representatives of Belcher New Jersey, Inc., the Belcher Company of New York, Inc., Belcher New England, Inc., Warren, and Northeast to Edwin Wahl of Apex. Apex alleges that in these conversations Wahl was told or led to conclude that these companies (1) intended to adhere to the terms and conditions of the nominations that they had previously submitted to the Exchange and (2) had a need for the oil as nominated or would have such a need in the very near future.

Before addressing the merits of the claims, the Court notes that these conversations do not involve the Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, DiMauro, Triad, TIC, Stinnes Corporation, Stinnes Interoil, Inc., Northeast Petroleum Industries, Inc., Northeast Petroleum Corporations, and Eastern. Apex argues that these other defendants are liable because the statements were made in furtherance of a conspiracy against Apex. Since Apex has failed to raise a triable issue of fact as to the existence of any conspiracy, its attempt to impute statements of certain defendants to others under a conspiracy

theory must fail.[4] Thus, there is no evidence that these other defendants made any misrepresentations and, therefore, summary judgment is granted to them on the eighth claim for relief.

The defendants alleged to have made representations, Northeast Petroleum Corp., Warren, The Belcher Company of New York, Inc. and Belcher New Jersey, Inc., argue that Apex was under an absolute contractual duty to deliver the oil on the date nominated and, accordingly, Apex could not rely to its detriment on their alleged representations of need. Where a plaintiff claims it was induced by representations to do that which it was already legally obligated to do there is no causal connection between the alleged misrepresentation and any injury to the plaintiff. *See, e.g., Ryan v. J. Walter Thompson Co.*, 453 F.2d 444 (2d Cir.1971), *cert. denied*, 406 U.S. 907, 92 S.Ct. 1611, 31 L.Ed.2d 817 (1972); *The Toledo Trust Company v. Nye*, 588 F.2d 202 (6th Cir.1978); *Coons v. Kidder, Peabody & Co., Inc.*, 539 F.Supp. 1145 (S.D.N.Y.1982).

Apex admits that if it were legally obligated to deliver the oil on the date nominated, the fraud claim must fail. Apex asserts, however, that the Court may not find that Apex was legally obligated to deliver the oil because (1) the nature of its contractual obligation is a disputed issue of material fact, and (2) the defendants may not rely upon the contract because they were acting pursuant to an unlawful conspiracy. The latter of these two grounds is vitiated by the grant of summary judgment on all conspiracy claims. Thus, the Court is left with the issue of Apex's contractual obligation. The parties argue at length about whether extrinsic evidence of industry practice may be considered by the Court on this point. Such evidence "is permitted for the

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[4] Apex suggests in its memorandum that misrepresentations may be imputed to the remaining defendants under the principle of aiding and abetting a common law fraud. Apex has not, however, alleged, much less offered evidence to prove, that anyone "aided and abetted" a fraud. Aiding and abetting fraud—like fraud itself—must be pleaded with particularity. *Armstrong v. McAlpin*, 699 F.2d 79, 92-93 (2d Cir.1983); *see also* Fed.R.Civ.P. 9(b). Having failed to allege aiding and abetting, that theory of imputing liability too must fail.

purposes of qualifying the meaning of a contract where otherwise ambiguous . . . . " *Western Union Telephone Co. v. American Communications Ass'n, C.I.O.*, 299 N.Y. 177, 184, 86 N.Ed.2d 162 (1949). The question not addressed by either Apex or defendants is whether the issue of Apex's contractual obligation is material.

The parties do sharply dispute the terms of the contract. Defendants argue that the combination of the rules and the nominating forms create an unambiguous obligation for a short to deliver at the time and in the manner nominated by the long. Apex counters with allegedly admissible evidence of an industry practice under which longs usually agree to take delivery throughout the month. This practice, it contends, raises a material fact issue as it its obligations. There is no need, however, for the Court to parse the rules and forms to determine whether an issue of fact exists as to the contractual obligation to deliver because, in the context of this case, any such analysis is irrelevant.

As events unfolded in the early days of February 1982, it was not the contract (nor defendants' representations), but the *Exchange,* and its power to impose severe sanctions for noncompliance with the terms of the contract as the Exchange interpreted them, which caused Apex to honor the nominations and to pay premiums to various defendants. The Exchange refused to rule on the validity of the February contracts when Apex sought to have the Exchange stretch out its delivery obligations but, as Apex states in its brief, "beginning on February 3, 1982 anad continuing thereafter, the Control Committee took the position that Apex was required to make delivery under the February contracts at precisely the times nominated by the long defendants."

Thus, whether or not Apex had a pre-existing legal obligation to deliver the oil based on the contract, Apex perceived an overriding obligation to make delivery based upon the position taken by the Exchange and clearly acted in reliance on that perception when resolving its delivery obligations. Indeed, Apex has conceded as much: "Because the delinquency penalties are so

severe . . . both in terms of actual dollars and in damage to reputation, the Exchange's refusal to rule on the validity of the Stinnes nomination and its threat to make a retroactive finding of delinquency compelled Apex to pay defendants [extortionate prices]."

[12] After construing the evidence in the light most favorable to Apex, this Court holds that no reasonable jury could find that Apex acted in reliance upon anything other than its perception that the Exchange would impose severe and reputation-harming sanctions for failure to deliver on the dates nominated. Seen in this light, it is evident that the alleged misrepresentations by the defendants were not material and that Apex did not rely upon any such misrepresentations. The Court reaches the same conclusion whether or not the "clear and convincing" standard applicable in cases of fraud is applied to Apex's proofs at this stage of the proceeding. *See Anderson*, __ U.S. __, 106 S.Ct. 2505.

Apex has also failed to raise a material fact issue as to the other elements of an action for fraudulent misrepresentation. First, Apex has failed to demonstrate that any actual falsehoods were uttered. There is no evidence to indicate that statements such as "I intend to adhere to my early nomination" were not truthful when made. No doubt the longs would have adhered to their nominations if Apex had not bought them out. And, as discussed earlier, statements of need are not misrepresentations in a market of this sort. Every participant in an active market has need for value and it stretches the bounds of semantics for Apex to assert that a representation of need could be false in this context.

Finally, while materiality and reliance are always closely related in the context of a fraud action, it may separately be said that Apex could not justifiably rely upon any of the alleged misrepresentations even in the absence of an overriding obligation imposed by the Exchange. No reasonable jury could believe that, in the aggressive trading on the Exchange, Apex would perform any act because another market participant "needed" or "wanted" performance.

Summary judgment is granted to defendants on Claim VIII.

SECTION 4b: CLAIM VI

In the Sixth Claim for Relief, the long defendants are each charged with violating Section 4b of the CEA, 7 U.S.C. § 6b, which provides in pertinent part:

> It shall be unlawful . . . for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person . . .
>
> (A) to cheat or defraud or attempt to cheat or defraud such other person;
>
> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
>
> (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or
>
> (D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person . . . .

"[Section] 4b, to put it mildly, is not an easy provision to construe . . . . 'While the intent to outlaw fraud is clear from the (A)-(C) subparagraphs, the syntactical mess which precedes them

makes it difficult to answer some basic questions about coverage.' " *Leist v. Simplot*, 638 F.2d 283, 322 (2d Cir.1980) (Friendly, J.) (citation omitted), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1980). Judge Friendly did, however, offer guidance as to the reach of 4b when he wrote that the section is not "limited to cases coming within its crabbed language," *id.* at 323, and it does not only prohibit " 'any person' from defrauding 'any other person' in connection with the making of a futures contract for or on behalf of that other person." *Id.* at 322.

[13] The defendants have moved for summary judgment on the grounds that Section 4b applies only to persons who act "for or on behalf of" the plaintiff in making a futures contract; since none of the long defendants acted for or on behalf of Apex, they argue, the claim should be dismissed. Thus, the central question raised by defendants on this motion is whether 4b can be read to apply to brokered transactions between longs and shorts so as to hold principals accountable to each other. Defendants argue that this question was not resolved in *Leist*. This Court disagrees and finds that Judge Friendly's expansive interpretation of 4b encompasses a case such as this. Even under this broad reading of 4b, however, summary judgment must be granted to defendants because no reasonable jury could conclude that they committed any of the proscribed acts.

As stated earlier, there is no genuine issue of material fact as to any claimed fraudulent or false statement by any long. First, no actionable statements were made. And second, in the context of the Exchange's stance regarding the enforcement of early nominations, long statements as to why they were insisting on early delivery were neither material nor relied upon by Apex.

[14] While there is evidence that a long or longs may have been out to "get" Apex and that Apex was not well liked after having massively sold the market short, there is no factual issue raised that any long sought to cheat, defraud or deceive Apex. As has been discussed, the decisions of certain longs to nominate for early delivery and to stand on those nominations were in accordance

with the rules of the Exchange as that body chose to interpret and enforce them. The fact that Apex was ultimately placed in the position of having to pay premium prices for oil to cover its delivery obligations was not the result of cheating or deceit. Rather, it resulted from the proper play of market forces, the action of the Exchange, and the high risk strategy of Apex in amassing its short position in the first place.

No genuine issue of material fact exists as to a violation of Section 4b of the CEA and summary judgment is therefore appropriate on Claim VI.

CONCLUSION

Summary judgment is granted to the defendants on all eight claims in the Amended Complaint and those claims are dismissed. The Court need not reach the various *in limine* motions or Stinnes Corporation's separate motion for summary judgment. All motions and cross-motions for sanctions pursuant to Fed.R.Civ.P. 11 are denied.

So Ordered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APEX OIL COMPANY,

Plaintiff,

— against —

82 Civ. 1796 (JMW)

JOSEPH DiMAURO, et al.,

JUDGMENT

Defendants.

Defendants having moved for summary judgment on all of plaintiff's claims, and the Court, by Opinion and Order, filed August 11, 1986 (the "Opinion"), having granted defendants' motions, thereby determining all of plaintiff's claims asserted against all defendants; and

Plaintiff having moved for an order pursuant to Rule 54(b), Fed. R. Civ. P., expressly directing entry of judgment on the Opinion based upon an express determination that there is no just reason for delay in the entry of judgment, defendants having not opposed the motion, and the Court, by Order, dated September 26, 1986 having granted plaintiff's motion, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

Plaintiff's Amended Complaint, dated January 7, 1986, and all claims contained therein, are hereby dismissed; and,

Pursuant to Rule 54(b), Fed. R. Civ. P., the Court expressly determines that there is no just reason for delay and expressly directs the entry of this judgment.

Dated: New York, New York
September 26, 1986

s/John M. Walker

John M. Walker
U.S.D.J.

SEVENTH AMENDMENT TO THE CONSTITUTION

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

SHERMAN ACT, SECTIONS 1 AND 2

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

COMMODITY EXCHANGE ACT, SECTIONS 5(d) AND 5a(8)

§ 7. Designation of board of trade as "contract market"; conditions and requirements

The Commission is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

* * * *

(d) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board.

* * * *

§ 7a. Duties of contract markets

Each contract market shall –

* * * *

(8) Enforcement and revocation of contract market rules

enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, that (i) have been approved by the Commission pursuant to paragraph (12) of this section, (ii) have become effective under such paragraph, or (iii) must be enforced pursuant to any Commission rule, regulation, or order; and revoke and not enforce any bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, that has been disapproved by the Commission;

RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts

that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Supreme Court, U.S.
FILED
NOV 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-633

APEX OIL COMPANY,
Petitioner,

v.

JOSEPH DIMAURO, *et al.*,
Respondents.

BRIEF OF THE BELCHER RESPONDENTS IN SUPPORT OF PETITION

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November 10, 1987

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In The
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-633

APEX OIL COMPANY,

Petitioner,

v.

JOSEPH DIMAURO, *et al.*,

Respondents.

BRIEF OF THE BELCHER RESPONDENTS IN SUPPORT OF PETITION

Pursuant to Rule 19.6, Respondents The Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New England Inc., and Belcher New Jersey, Inc. (hereinafter collectively, "Belcher" or the "Belcher Respondents")[1] submit this brief[2] in support of the petition of Apex Oil Company ("Apex") seeking review of a decision and judgment of the United States Court of Appeals for the Second Circuit (A 3-36).[3]

In Point II of its petition, Apex urges that the appropriate evidentiary standard by which to link a defendant to an antitrust conspiracy is "slight evidence"; that the court

[1] The disclosure required by Rule 28.1 is contained in Belcher's petition for a writ of certiorari pending before the Court (No. 87-631).

[2] Apex's petition was received on October 21, 1987. Accordingly, this brief is timely.

[3] References are to pages in Apex' appendix to its petition.

below misunderstood that standard; and, in all events, the court misapplied it. (Apex Pet., pp. 21-24).

In Belcher's separately filed petition for certiorari (No. 87-631), we also urged that the court below failed to apply the correct evidentiary standard for inferring membership in an antitrust conspiracy and, in particular, contested the applicability of the "slight evidence" standard in light of this Court's pronouncements in *Matsushita*[4] and the cases preceding it. As we argued in our petition:

> In its analysis of the Berberich notes—the crucial evidence linking Belcher to the Northeast-Global conspiracy—the Second Circuit made several errors reflecting its failure to apply the proper *Matsushita* analysis. *First,* the court noted that "once a conspiracy is shown, only 'slight evidence' is needed to link another defendant with it" (26a). By mandate of this Court, however, Apex, faced with defendants' denials, was required to come forward not with so-called "slight evidence", but rather with "significant probative evidence, which tends to exclude the possibility that the alleged conspirators acted independently." *Cities Service,* 391 U.S. at 277-88; *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.,* 513 F.2d 102 (2d Cir. 1975); *Reborn Enterprises, Inc.* v. *Fine Child, Inc.,* 590 F. Supp. 1423 (S.D.N.Y. 1984), *aff'd,* 754 F.2d 1072 (2d Cir. 1985). The Second Circuit thus relied on an inapplicable standard, and impermissibly bootstrapped its finding of a Global-Northeast conspiracy into an inference of Belcher's participation.

Belcher Pet., pp. 14-15.

Rule 21.1(a) of this Court provides:

> "The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein."

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[4] *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.,* 475 U.S. 574, 106 S. Ct. 1348 (1986).

"[W]hen resolution of a 'question of law is a 'predicate to intelligent resolution' of the question on which we granted certiorari,' it can be regarded as 'fairly comprised within it.' *Vance* v. *Terrazas,* 444 U.S. 252, 258-59 n.5 (1980); *Cuyler* v. *Sullivan,* 446 U.S. 335, 342-43 (1980)." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 361 (6th ed. 1986). Indeed, questions not explicitly mentioned but "essential to analysis" of the decisions below or "to the correct disposition of the other issues" have been treated as "subsidiary issues 'fairly comprised' by the question presented." *Procunier* v. *Navarette,* 434 U.S. 555, 559-60 n.6 (1978); *United States* v. *Mendenhall,* 446 U.S. 544, 551-532 n.5 (1980). Since the second question presented by Apex (Apex Pet., p. "i") fairly comprises within it the very questions which Belcher has asked this Court to review (Belcher Pet., p. "i"), we support the granting of Apex' petition for certiorari. For the reasons set forth in our petition (No. 87-631), we believe that the appropriate evidentiary standard for inferring membership in an antitrust conspiracy is a matter now appropriate for review by this Court.

CONCLUSION

For the foregoing reasons, the Belcher respondents pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, upon the second question set forth in Apex' petition (No. 87-633) and the questions set forth in Belcher's petition (No. 87-631).

November 10, 1987

Respectively submitted,

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No. 87-633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

APEX OIL COMPANY,

Petitioner,

—against—

JOSEPH DiMAURO, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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APEX OIL COMPANY,

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—against—

JOSEPH DIMAURO, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Joseph DiMauro, Triad Petroleum, Inc., and TIC Commodities, Inc.[1] (collectively, "DiMauro") oppose the petition by Apex Oil Company ("Apex") for a writ of certiorari to the United States Court of Appeals for the Second Circuit on the following grounds:

I.

There was no misapplication of any decision of this Court

Apex argues that the Court of Appeals misapplied this Court's decision in *Monsanto Co.* v. *Spray-Rite Service Co.*, 465 U.S. 752 (1984), by failing to reverse as to DiMauro on the ground that only "slight evidence" is necessary to link them to the alleged conspiracy. Apex is wrong for several reasons:

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1 There are no parent, subsidiary or affiliate corporations of these respondent corporations. Cf. Supreme Court Rule 28.1.

1. The Court of Appeals took express cognizance of the so-called "slight evidence" standard (A-26), but found that Apex had not satisfied it as to DiMauro. Apex is simply asking this Court to review and refind the facts of this case. That is not a "special and important reason" for this Court to hear this case. Cf. Supreme Court Rule 17.

2. The decisions below are consistent with, not in conflict with, the decisions of this Court. The "slight evidence" standard is stated in decisions in the Courts of Appeal (not this Court) which preceded this Court's decisions in *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 89 L.Ed.2d 538 (1986)[2] and *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 574, 91 L.Ed.2d 202 (1986). As the Court stated in *Anderson*:

> "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it up to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the

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2 *Matsushita* amplified upon and refined *Monsanto*, explaining how *Monsanto* should be applied on a motion for summary judgment in a complex antitrust case such as this. Significantly, Apex does not accuse the Courts below of misapplying *Matsushita*; rather, it virtually ignores that later, controlling decision. Apex now pitches its argument on *Monsanto* (Petition, at 22-23), a decision which Apex argued in the District Court was inapplicable since it involved only the rights of distributors and was not decided on summary judgment (Apex's Memorandum in Opposition to Defendants' Six Motions for Summary Judgment, at pp. 131-33).

party producing it, upon whom the onus of proof is imposed."

91 L.Ed.2d at 213 (emphasis in original), quoting from *Improvement Co.* v. *Munson*, 14 Wall 448, 20 L.Ed. 867 (1872). The decisions below, dismissing the case as to DiMauro, are fully consistent with those authorities, which are controlling at bar. Apex does not even argue, much less show, that the decisions below conflict with *Matsushita*. If and to the extent that the "slight evidence" cases are inconsistent with *Matsushita* and *Anderson* (a matter which this Court need not determine here, since the Court of Appeals found that Apex failed to satisfy even the "slight evidence" standard), they must give way to those controlling pronouncements of this Court.

3. Apex has misstated the facts and the alleged evidence as to DiMauro in order to exaggerate and speculate about his conduct. Both Courts below, upon a careful and detailed examination of the record, correctly found that there was *no evidence* to link DiMauro to the alleged conspiracy, but rather only conjecture, hearsay and suspicion. For example, the allegation that DiMauro called a meeting of longs (cf. Petition, at 10) is based upon only rumor and hearsay; indeed, the alleged sources of that rumor[3] and hearsay expressly denied that DiMauro did so or that they had even said that he did (see, e.g., JA 5346-48). Both the District Court and the Court of Appeals properly recognized the non-probative nature of Apex's proffers vis-a-vis DiMauro.

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3 Rumors are, of course, inadmissable hearsay and of noprobative value. See, e.g., *Pink Supply Corp. v. Hiebert, Inc.*, 612 F.Supp. 1334, 1346 (D. Minn. 1985); *Hawk v. Brosha*, 590 F.Supp. 337, 340 (E.D. Pa. 1984) ("rumors . . . are hearsay and hence inadmissible, and for that reason do not suffice to create as issue of material fact . . ."). See also: *Oreck Corporation v. Whirlpool Corporation*, 639 F.2d 75, 81 n. 35 (2d Cir. 1980), cert. denied, 451 U.S. 1083 (1981); *U.S. v. Cirillo*, 499 F.2d 872 (2d Cir. 1974), cert. denied, 419 U.S. 1056 (1975). Such "evidence" could not and did not create a "genuine issue of material fact", as required by *Matsushita* (89 L.Ed.2d at 551-52).

II.

Apex has not been deprived of its constitutional right to a jury trial

Apex argues here (although it did not do so in the District Court) that the grant of summary judgment resulted in "the unconstitutional abrogation of the Seventh Amendment right to a jury trial" (Petition, at 20). Apex is wrong, having overlooked this Court's recent decisions in *Tull* v. *United States*, 481 U.S. ____, 95 L.Ed.2d 365, 374 (1987) and *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 91 L.Ed.2d 265 (1986).

In *Tull*, the Court expressly rejected, as "without merit", the argument that permitting the trial court to take a case away from the jury would improperly "destroy the constitutional right of trial by jury", explaining:

> "The defendant was, of course, entitled to have a jury summoned in this case, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law."

95 L.Ed.2d at 574, quoting from *Hepner v. United States*, 213 U.S. 103, 115 (1909). Similarly, in *Celotex*, the Court explained:

> "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis."

91 L.Ed.2d at 276. Accord: *Anderson*, *supra* (91 L.Ed.2d at 213-214) (summary judgment standard "mirrors the standard for a directed verdict").

The right to a jury trial is not a right to go to the jury on a claim for which the plaintiff is unable to adduce evidence sufficient to raise a genuine issue of material fact. That is especially so where, as here, the plaintiff has been called on to do so on the eve on the trial, after years of intensive and extensive discovery, including more than 140 depositions and production of scores of thousands of documents. See, e.g., *Matsushita, supra* (475 U.S. 574).

Conclusion

The decision of the Court of Appeals is fully in accord with this Court's recent salient pronouncements on the subjects of summary judgment, antitrust conspiracy, and the right to a jury trial. It warrants no review on certiorari by this Court.

November 10, 1987

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—against—

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT NEW YORK MERCANTILE EXCHANGE

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November 16, 1987

QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying the rule of its 1984 decisions in *Sam Wong & Son, Inc.* v. *New York Mercantile Exchange* and *Ryder Energy Distribution Corp.* v. *Merrill Lynch Commodities Inc.* (not cited in the petition) that the bad faith standard for contract market liability under the Commodity Exchange Act requires that the sole or dominant reason for the contract market's action or inaction be ulterior motive or self interest?

2. Whether the court of appeals erred in finding on the facts that there was not even "slight evidence" linking the contract market defendants to any antitrust conspiracy?

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IN THE

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APEX OIL COMPANY,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT NEW YORK MERCANTILE EXCHANGE

Respondent New York Mercantile Exchange ("Exchange")[1] respectfully requests that the Court deny the petition of Petitioner Apex Oil Company ("Apex") that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered on June 17, 1987, which affirmed the judgment of the United States District Court for the Southern District of New York, granting the motion of the Exchange for summary judgment dismissing Apex's complaint against it.

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1 Pursuant to Rule 28.1, the Exchange advises the Court that the Exchange is a not-for-profit corporation having no parents, subsidiaries, or affiliates.

STATEMENT OF THE CASE

This action exists because Apex chose not to liquidate its short position of approximately 4400 February 1982 futures contracts (for delivery of roughly 184 million gallons of heating oil) before trading in the contract ended on the Exchange. Apex chose not to liquidate its short position although Apex was not in a position to deliver in accordance with the Rules of the Exchange. (Pet. App. at A43, A46).[2]

Apex had placed itself in a predicament akin to that described by Daniel Drew in the last century: "He who sells what isn't his'n must buy it back or go to prison."

The Exchange is a designated contract market on which its clearing members on behalf of themselves and customers enter into contracts to make ("short") or take ("long") future delivery of various commodities. Apex's clearing member was Goldman Sachs & Co. ("Goldman Sachs").

The Exchange is a self-regulatory body. It adopts Rules establishing the terms of contracts traded on the Exchange, Commodity Exchange Act ("CEA") § 5a(12), 7 U.S.C. § 7a(12) (1982); CFTC Reg. 1.41, 17 C.F.R. § 1.41 (1987).

The Exchange is itself closely regulated by the Commodity Futures Trading Commission ("CFTC"). All contract and trading Rules must be approved by the CFTC, CEA § 5a(12), 7 U.S.C. § 7a(12) (1982). The Exchange may not enforce unapproved Rules; once approved, the Exchange must enforce and may not revoke Rules, CEA § 5a(8) and (12), 7 U.S.C. § 7a(8) and (12) (1982); CFTC Reg. 1.53, 17 C.F.R. § 1.53 (1987).

Apex's complaint is that the Exchange did not help Apex out of the predicament of its own making in February 1982—that

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2 The following abbreviations are used in this brief: "Pet. ___" for citation to the Petition for a Writ of Certiorari, "Pet. App. ___" for citation to the Appendix to the Petition, and "A ___" for citations to the Joint Appendix filed with the court of appeals.

the Exchange did not take emergency action. Apex contends that the Exchange should have altered its delivery Rules to permit Apex to deliver, as the amended complaint put it, "reasonably over the course of the delivery month" (A 767), rather than in accordance with Exchange Rules.

Apex had no oil at GATX, the facility it had designated for delivery. (Pet. App. at A50). Apex made false representations to the Exchange concerning the amount of oil it had (and would have) at GATX. (Pet. App. at A50). Instead of changing the Rules, the Exchange "jawboned" clearing members representing the longs, who were to take delivery, and Apex, the short who was to make delivery. (Pet. App. at A103). The Exchange met with representatives of Apex and the longs. (Pet. App. at A12, A50). It discussed ways of resolving the delivery problem and urged flexibility. It did not change the Rules which it was bound to enforce absent emergency action. It reminded Goldman Sachs, the short clearing member acting for Apex, of the penalties for delinquency and default in the event of a failure to deliver. As a result of the efforts of the Exchange there was no default. (Pet. App. at A13, A51). The Exchange enforced its Rules. Apex, which had no oil, bought oil and the delivery problem was resolved.

The district court, in a detailed and careful opinion, ruled that there was no evidence of bad faith or of participation by the Exchange in a conspiracy and granted summary judgment dismissing all claims against the Exchange. (Pet. App. at A96-A108). The court of appeals affirmed, stating that:

> "Apex failed to present evidence tending to show that the Exchange acted or failed to act as a result of self interest or bad faith as interpreted in a number of this court's decisions. *See, e.g., Brawer* v. *Options Clearing Corp.*, 807 F.2d 297 (2d Cir. 1986); *Sam Wong & Son* v. *New York Mercantile Exchange*, 735 F.2d 653 (2d Cir. 1984)."

(Pet. App. at A35).

For a complete statement of the case, the Court is respectfully referred to the decision of the court of appeals (Pet. App. at A7-A13) and the decision of the district court (Pet. App. at A42-A51, A96-A101).[3]

REASONS FOR DENYING THE PETITION

I. The Decisions of the Court of Appeals Concerning the Meaning of the "Bad Faith" Standard Are Correct, Are Not The Subject of Conflicting Decisions and Do Not Warrant Review by the Court

A. There is No Conflict Among the "Federal Courts"

The bad faith standard of liability applicable to a commodity exchange is well established, and, contrary to Apex's assertions, there is no conflict among the federal courts of appeals concerning it. The petition does not present any question worthy of review by this Court. *See* Supreme Court Rule 17.

Two decisions of the United States Court of Appeals for the Second Circuit, the more recent of which is not even cited by Apex, establish that bad faith governs all claims addressed to the regulatory conduct of commodity exchanges ("contract

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3 There are numerous misstatements in Apex's statement of the case. For example, Apex asserts, without citation, that there was "full knowledge of that conspiracy on the part of the exchange defendants." (Pet. at 6 n.7). To the contrary, the district court found "insufficient probative evidence . . . that the exchange defendants knew of any such conspiracy" (Pet. App. at A103), and that finding was sustained by the court of appeals.

Another example is Apex's misleading description of the Rules of the Exchange and the parties' obligations thereunder. (Pet. at 7-8). While the parties were allowed to "work out" changes in dates, times and places for delivery, the Rules state the requirements for delivery absent such consensual changes. A long had the right to nominate the date of delivery. Absent an agreement, the short was obliged to deliver on that date. The district court and the court of appeals so found. (Pet. App. at A10, A47-A48).

markets" designated as such by the CFTC under the CEA). A cause of action does not lie against an exchange unless "self-interest or other ulterior motive unrelated to proper regulatory concerns" is the "sole or the dominant reason" for the action or inaction in question. *Sam Wong & Son, Inc.* v. *New York Mercantile Exchange*, 735 F.2d 653, 677 (2d Cir. 1984) ("*Sam Wong*"); *Ryder Energy Distribution Corp.* v. *Merrill Lynch Commodities Inc.*, 748 F.2d 774 (2d Cir. 1984) ("*Ryder Energy*"). Judge Meskill's opinion for the Second Circuit in *Ryder Energy* stated the rule as follows:

> "A claim of bad faith must be supported by two allegations: first, that the exchange acted or failed to act with knowledge; *and* second, that the exchange's action or inaction was the result of an ulterior motive. *Sam Wong*, 735 F.2d at 671; *Miller* v. *New York Produce Exchange*, 550 F.2d 762, 766-67 (2d Cir.), *cert. denied*, 434 U.S. 823 . . . (1977)."

(*Ryder Energy*, *supra*, 748 F.2d at 780, emphasis added).

Apex, not even citing *Ryder Energy*, incorrectly argues that bad faith is established "where an exchange knows of a manipulation but fails to take any action to prevent it." (Pet. at 15). In addition to the *Ryder Energy* decision, the construction for which Apex argues was urged upon and rejected by the Court of Appeals for the Second Circuit in *Sam Wong*. Judge Friendly's opinion for the court there makes clear that the same standard applies to both exchange action and inaction: "[A] plaintiff . . . [will] have the initial burden of showing that ulterior motive, *e.g.*, financial gain or personal animosity was 'a substantial or motivating factor' in the *taking of or failure to take action*." 735 F.2d at 677 (emphasis added; citations omitted).

In *Ryder Energy*, the Second Circuit, citing *Sam Wong*, reiterated that "[w]e have recently made it clear that the bad faith requirement governs claims of both exchange action and inaction." 748 F.2d at 780. In *Ryder Energy*, plaintiff alleged the Exchange knew that clearing members were violating Ex-

change rules and failed to enforce them (as is argued by Apex here).[4]

Apex has not shown why the Court should review the rule of the court of appeals on the bad faith standard. In urging a different standard Apex relies upon inapposite or superseded decisions decided before the court of appeals decisions in *Sam Wong* and *Ryder Energy*,[5] and a brief filed by the CFTC with the Court of Appeals for the Seventh Circuit. (Pet. at 19).[6]

Apex also cites *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944) ("*Baird*"), a case involving a claim against the stock exchange based on broker misconduct,

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4 The February 1982 delivery problem shows exactly why alleged knowledge alone is not sufficient. If the Exchange knew that the longs were conspiring (it did not) and also knew that Apex violated the Rules by not having oil to deliver (it did not know this until late on February 5), it would have faced a delivery problem and two wrongdoers. In this situation, the Exchange must have discretion to enforce the delivery Rules and then discipline the wrongdoers. The fact that the Exchange first enforces the Rules and then addresses the wrongdoers should not be a basis for liability. The Exchange, as *Ryder Energy* squarely held, may act in good faith with knowledge of wrongdoing so long as it acts honestly and in the interest of the market.

5 All of the district court cases cited by Apex (Pet. at 19 & n.14) were decided before the decisions in *Sam Wong* and *Ryder Energy*. To the extent that any of those decisions applied a standard of negligence or differing standards to govern exchange action and inaction, such decisions have been overruled by *Ryder Energy* and *Sam Wong*.

6 The only other authority cited by Apex, *Deaktor* v. *L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd per curiam sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973), does not even address the standard of liability. As that court stated: "[t]he sole issue in these appeals is whether the district court could take jurisdiction of these actions or whether the Commodity Exchange Commission properly has primary jurisdiction over these proceedings." 479 F.2d at 531. While letting stand a negligence claim, the decision includes no discussion whatsoever of the standard of liability because that issue was not before the court.

and its progeny,[7] to attempt support its assertion that the courts of appeals are in conflict on the question of whether bad faith can be shown by exchange inaction.[8] The court of appeals has recently declined to follow *Baird* and has held that the bad faith standard of liability governs private actions against securities exchanges, *Brawer* v. *Options Clearing Corp.*, 807 F.2d 297 (2d Cir. 1986), *cert. denied*, 56 U.S.L.W. 3243 (U.S. Oct. 5, 1987) (No. 86-1825) ("*Brawer*"), relying upon decisions holding that bad faith is the standard of liability in actions against commodity exchanges and upon the 1982 codification of the bad faith standard in section 22(b)(4) of the CEA, 7 U.S.C. § 25(b)(4) (1982).[9]

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7 *Hochfelder* v. *Midwest Stock Exchange*, 503 F.2d 364 (7th Cir.), *cert. denied*, 419 U.S. 875 (1974); *Marbury Management, Inc.* v. *Alfred Kohn, Wood, Walker & Co.*, 373 F. Supp. 140 (S.D.N.Y. 1974).

8 In *Baird*, the court of appeals held that the stock exchange was required to enforce its rules requiring disciplinary action. However, *Baird* is inapposite since it involved construction of a written agreement between the stock exchange and the Securities and Exchange Commission ("SEC") required by former § 6(a)(1) of the Securities Exchange Act of 1934 as a condition to registration. 15 U.S.C. § 78f(a)(1)(1940). 141 F.2d at 242. No such provision governed or governs commodity exchanges.

In any event, as Justice Harlan once stated:

> "[C]ontrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself."

J.M. Harlan, *Manning the Dikes*, 13 A.B.C.N.Y. Record 541, 552 (1958). *See also* Supreme Court Rule 17.

9 Section 22(b)(4) reads as follows:

> "A person seeking to enforce liability [for failure of an exchange to enforce a rule or for enforcement of a rule] must establish that the contract market, licensed board of trade, clearing organization, registered futures association, officer, director, governor, committee member, or employee acted in bad faith in failing to take action or in taking such action as was taken, and that such failure or action caused the loss."

This clause applies to Mr. Raber, the Exchange's Vice-Chairman in 1982, as an officer and governor of the Exchange.

The *Brawer* ruling applied the bad faith standard to a self-regulatory body's decision not to adjust an option price to the consequent disadvantage of option writers and the advantage of option holders. The instant case presents another instance of discretionary exchange decision-making—action or inaction—to the disadvantage of a short required, but unable, to make delivery and (it was alleged) to the advantage of longs required and entitled to take delivery.

Finally, Apex's citation (Pet. at 15, 19) of a CFTC Brief filed in a case which, according to the CFTC, does not involve discretionary exchange response to a market crisis—but rather involves exchange responsibility for an elaborate scheme to defraud investors orchestrated by one of its members—further underscores the absence of conflicting courts of appeals authority on the definition of bad faith. (Pet. at 15).

B. The Courts Below Correctly Applied the Bad Faith Standard.

The court of appeals and the district court correctly concluded that there was no self interest, nor ulterior motive and therefore no bad faith. (Pet. App. at A35, A102). Apex does not allege that the Exchange had any personal interest in the February deliveries or any bias toward any participant in the deliveries. The Exchange acted to address a delivery problem (A 2622) that would not have occurred if Apex had been in a position to deliver.

As stated by the district court, "Apex's true quarrel with the Exchange is that it failed to interpret the rules as Apex would have liked. This does not raise an issue of bad faith." (Pet. App. at A105).

C. Petitioner's First Question Has Been Addressed by Congress

As Apex recognizes, Congress in 1982 amended the CEA to expressly provide that "bad faith" must be shown to state a claim against a contract market, CEA § 22(b)(4), 7 U.S.C.

§ 25(b)(4).[10] While this case arises prior to the codification of the bad faith standard, the existence of the amended statute highlights that there is no "special and important" reason for this Court to consider the question. Supreme Court Rule 17.

II. The Summary Judgment Dismissal of an Antitrust Claim by the District Court Affirmed by the Court of Appeals, Even Under the "Slight Evidence" Concept of That Court, Does Not Warrant Review By This Court

Apex cannot transform what is essentially its disagreement with findings of fact into a legal issue by contending that the court of appeals misapplied the Court's decision in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), in affirming the district court's summary judgment decision. Contrary to Apex's contention, the court of appeals explicitly applied its "slight evidence" rule in deciding whether the Exchange (or any other defendant) was connected to the conspiracy. (Pet. App. at A28, A32-A33).

> "We have carefully reviewed this evidence and, while we reverse and remand as to the antitrust claims against Belcher for the reasons stated above, *and remain aware that " 'once a conspiracy is shown, only slight evidence is needed to link another defendant with it,' " Wilkinson, supra*,[11] *since we do not find such a link*, we conclude that affirmance of the grant of summary judgment is appropriate as to the remaining defendants."

(Pet. App. at A28) (emphasis added).

While under the "slight evidence" concept of the court of appeals, a lesser showing may be required to connect (the Exchange does not accept the correctness of this concept) a particular defendant to a conspiracy than is necessary to

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10 *Sam Wong* held that the bad faith standard applies to pre-1982 causes of action.

11 *United States* v. *Wilkinson*, 754 F.2d 1427, 1436 (2d Cir.), *cert. denied*, 472 U.S. 1019 (1985) (*quoting United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974)).

establish the existence of a conspiracy in the first instance, it does not abrogate the requirement that to survive a motion for summary judgment plaintiff must present probative evidence that a particular defendant was linked or connected to the conspiracy.[12] The court of appeals, after a careful review of the district court's decision and the record, concluded that there was no credible evidence from which "plausible" inferences could be drawn linking the Exchange to any antitrust conspiracy. (Pet. App. at A33). In making this inquiry, it is clearly appropriate to evaluate the probity of particular circumstantial evidence in light of the *Monsanto* "tends to exclude" evidentiary standard. Apex's attempt to argue (Pet. at 23) that, against the backdrop of a conspiracy, any use of the *Monsanto* analysis constitutes an "unsupportable extension" of the decision defies common sense. Apex is in fact merely quibbling with the lower courts' findings of fact.[13] That is not an appropriate matter for review by this Court.

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12 *See, e.g.*, *United States* v. *Wardy*, 777 F.2d 101, 107 (2d Cir. 1985), *cert. denied*, 475 U.S. 1053 (1986) ("[H]owever slight or circumstantial, the evidence must tend to prove that the appellants did enter into some form of agreement.").

13 Apex's argument that it has been deprived of its Seventh Amendment right to a trial by jury is without merit. Where summary judgment has been properly granted (as here), no right to jury trial is denied. *Tull* v. *United States*, 107 S. Ct. 1831, 1836 (1987); *Celotex Corp.* v. *Catrett*, 106 S. Ct. 2548, 2555 (1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

November 16, 1987

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No. 87-633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

APEX OIL COMPANY,

Petitioner,

v.

JOSEPH DiMAURO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

STINNES RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly granted summary judgment to respondents Stinnes Corporation and Stinnes Interoil, Inc. as alleged antitrust co-conspirators in the absence of any evidence connecting them to the alleged conspiracy.

RULE 28.1 LISTING

Pursuant to Supreme Court Rule 28.1 respondents Stinnes Corporation and Stinnes Interoil, Inc. state as follows:

1. Stinnes Interoil, Inc. is a wholly owned subsidiary of respondent Stinnes Corporation.

2. Stinnes Corporation's corporate parent is Stinnes A.G., a German corporation, the ultimate parent of which is Veba Aktiengesellschaft, also a German corporation. Stinnes Corporation has hundreds of non-domestic affiliates throughout the world. Its domestic affiliates are the following:

Brenntag Interchem, Inc.
Delta Distributors, Inc.
Delta Solvents and Chemicals Company
Delta Solvents and Chemicals Company of Louisiana
Deminex U.S. Oil Co.
F. & S. Alloys & Minerals Corp.
Goldberg Emerman Corp.
Hansen Coal Corporation
Houston SRE, Inc.
Huels America Corporation
Jet Oil Company
Mark Producing Inc.
Miller & Company
Nuodex, Inc.
Nuodex International Sales Corp.
Precision National Plating Services, Inc.
Rhunes Transport International Corporation
SOCO, Inc.
SOCO-Western Chemical Corp.
SRE Carlsbad, Inc.
Steelinter [USA] Inc.
Stinnes Coal Company, Inc.
Stinnes-Texas, Inc.
Tamco Resources Corporation
Textile Chemical Co. Inc.
VEBA Coal USA Inc.
VEBA Funding Inc.
Westmoreland Coal Corporation

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STINNES RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Stinnes Corporation and Stinnes Interoil, Inc. ("Stinnes"),[1] respectfully request that this Court deny the petition of Apex for a writ of certiorari seeking review of the opinion in this case by the United States Court of Appeals for the Second Circuit, which is reported at 822 F.2d 246 (1987).[2]

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[1] Stinnes adopts the same shorthand references to the parties used in the petition. (Pet. at 3 n.4).

[2] The Second Circuit's opinion is also set forth in full in the petitioner's Appendix at A3-A36.

STATEMENT OF THE CASE

Rather than respond to the petitioner's mischaracterization of the facts, Stinnes refers the Court to the opinions of the Second Circuit and the District Court, which fully set forth the factual and procedural history of this case. (Pet. App. at A7-A15; A43-A53).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Second Circuit's Opinion Did Not Misapply *Monsanto*

Only the Second Question Presented in Apex' petition is directed to Stinnes.[3] Contrary to Apex' contention, however, the Second Circuit's opinion does not involve a "misapplication of this Court's decision in *Monsanto*,[4] resulting in the unconstitutional abrogation of the Seventh Amendment right to a jury trial." (Pet. at 20).

Applying this Court's *Monsanto* and *Matsushita*[5] guidelines for determining whether summary judgment should be granted in an antitrust conspiracy case, the Second Circuit concluded that a jury should decide whether a conspiracy existed between two of the defendants, Global and Northeast. (Pet. App. at A24). Having found that a conspiracy might be inferred between two of the defendants, the Second Circuit then proceeded to review the record to determine whether there was some evidence to con-

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[3] The First Question presented is addressed solely to the Exchange.

[4] *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

[5] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986).

nect any of the other defendants to that conspiracy.[6] (Pet. App. at A24-A33). In doing so, it applied the so-called "slight evidence" rule. (Pet. App. at A26). Writing for the panel, Judge Pierce clearly stated:

> We have carefully reviewed this evidence and, while we reverse and remand as to the antitrust claims against Belcher for the reasons stated above, and *remain aware that " 'once a conspiracy is shown, only slight evidence is needed to link another defendant with it,' " Wilkinson, supra,*[7] *since we do not find such a link,* we conclude that affirmance of the grant of summary judgment is appropriate as to the remaining defendants.

(Pet. App. at A28) (emphasis added). Hence, Apex' assertion that the Court of Appeals "failed to consider the evidence against the other defendants against the backdrop of conspiracy" is incorrect. (Pet. at 23). That is precisely what the Second Circuit considered.

Apex also suggests in its petition that the Court of Appeals granted Stinnes summary judgment based on the "tends to exclude" evidentiary requirement of *Monsanto* and failed to apply the "slight evidence" rule. (Pet. at 22-23). What Apex glosses over, however, is that, though the "slight evidence" rule concededly requires a lesser showing than necessary to infer the existence of a conspiracy in the first instance, it nonetheless requires at

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[6] As the result, the Court of Appeals reversed and remanded as to Belcher for trial. Belcher has filed its own petition for a writ of certiorari (No. 87-631) and has predictably joined in Apex' petition. Also pending before the trial court are the counterclaims of Stinnes and Belcher for manipulation by Apex and that of the Exchange, none of which were the subject of any summary judgment motion.

[7] *United States v. Wilkinson*, 754 F.2d 1427, 1436 (2d Cir.), *cert. denied*, 472 U.S. 1019 (1985) (quoting *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974)).

least some evidence of a *link* or *connection* by the defendant to the conspiracy.[8] As to Stinnes, the Second Circuit's careful review of the evidence revealed absolutely no link or connection to the conspiracy between Global and Northeast. (Pet. App. at A28-A29). Indeed, like the District Court, it considered "what inferences reasonably may be drawn from each piece of evidence" as well as the inferences "in light of all of the evidence proffered by Apex." (Pet. App. at A21).

Moreover, merely because the Court of Appeals chose to adopt some of the findings of the District Court, which are set forth in detail in the exhaustive 75-page District Court opinion, it does not follow, as the petition asserts, that the Court of Appeals ignored the "slight evidence" rule which it expressly endorsed and followed. (Pet. at 23). In fact, mindful that, unlike the District Court, it did find that Apex' evidence could possibly establish a conspiracy between some of the defendants, the Second Circuit stated:

> [W]e have carefully considered the arguments of Apex with respect to these conversations. For *essentially* the reasons stated by the district court, *see* 641 F. Supp. at 1266-69, we conclude that inferring the existence of a conspiracy from the remaining conversations would amount to mere speculation.

(Pet. App. at A28) (emphasis added). The portion of the District Court's opinion referenced in the Second Circuit's

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[8] For example, each of the cases relied upon and quoted at page 21 of Apex' petition refer to the necessity of such a nexus. *See also United States v. Marsh*, 747 F.2d 7, 13 (1st Cir. 1984) ("It perhaps should be called the 'slight connection' rule instead of the 'slight evidence' rule."). *Accord United States v. Wardy*, 777 F.2d 101, 107 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1280 (1986); *United States v. DeLuna*, 763 F.2d 897, 924 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985).

opinion supports the Court of Appeals' adherence to the "slight evidence" rule because it demonstrates that Apex failed to establish that Stinnes was "linked" or "connected" to the conspiracy. (Pet. App. at A75-A82).

For example, the District Court aptly pointed out that, of the thirteen groups of communications urged by Apex to establish the conspiracy, only one involved Stinnes and that was its contacts with DiMauro, its broker. (Pet. App. at A81-A82). The District Court further observed that:

> [O]nce the communications between client and broker are excluded—as they must be—we are left with a total of *six* communications . . . between the six alleged co-conspirator longs, hardly a "pattern of pervasive inter-firm communications". It is significant that *none* of the communications involved Eastern or Stinnes. . . .

(Pet. App. at A82) (emphasis original). Accordingly, the Second Circuit's concurrence with the District Court's finding that there was no evidence that Stinnes had had *any* contact with the other longs, including Global and Northeast, is totally consistent with its determination that Apex failed to satisfy even the "slight evidence" rule with respect to a Stinnes "connection" to the conspiracy.[9]

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[9] In contrast to the total absence of any evidence linking Stinnes to the alleged conspiracy, the Court of Appeals did find that Apex satisfied the slight evidence standard against Belcher. (Pet. App. A27). That evidence—a conversation between principals of Global and Belcher, notes by a Belcher principal that were similar to those of a Northeast principal, and additional notations by a Belcher principal—was held to be sufficient that a jury might infer "that Belcher, Global and Northeast 'had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.' " *Id.*

Finally, having found no link between Stinnes and the possible Global-Northeast conspiracy the Second Circuit then reviewed the evidence to determine if a second and separate conspiracy involving Stinnes might be inferred under *Monsanto*:

> Apex offers no evidence tending to show that this sequence was part of any agreement *beyond* one between Stinnes and its broker, DiMauro. Moreover, the fact that Stinnes used its broker to make the offers does not amount to an illegal conspiracy. A more likely inference from this evidence is that once the market became aware of Apex's delivery obligations, Stinnes and others, as rational sellers, raised the price of oil in order to take advantage of Apex's plight.

(Pet. App. at A29) (emphasis added). This inquiry was likewise a correct application of the *Monsanto* test.

2. The Second Circuit Did Not Abrogate Petitioner's Seventh Amendment Right To A Jury Trial And Review By This Court Would Involve A Mere Reexamination Of The Evidence

Apex does not and cannot contend that the decision of the Court of Appeals is in conflict with any decision by this Court or any other court of appeals. Rather, it asserts that the Second Circuit's decision should be reviewed because "as interpreted below, *Monsanto* would become a vehicle for the wholesale abrogation of an antitrust plaintiff's constitutional right to a jury trial." (Pet. at 23).

As demonstrated above, the Second Circuit did not misinterpret or misapply *Monsanto*. Similarly, Apex' *in terrorem* fear of infringement of Seventh Amendment rights is without basis since it is well settled that a properly granted summary judgment motion does not violate a

party's Seventh Amendment rights. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902). Indeed, in holding that the test on a summary judgment motion is the same as that on a motion for directed verdict this Court has endorsed "taking the case from the jury" when appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2512 (1986); *Matsushita*, 106 S. Ct. 1348, 1357.

The Second Circuit not only correctly applied *Monsanto*, but in doing so it was sensitive to Apex' Seventh Amendment rights, explaining the delicate balance between the two as follows:

> We must note however that *while summary judgment is a valuable means for avoiding unnecessary trials*, and recent Supreme Court as well as Second Circuit cases have tended to encourage its use in complex cases such as this one . . . *it should not be regarded as a substitute for trial.* Thus, while the Supreme Court has indicated that trial courts should draw only reasonable inferences in favor of the non-moving party viewing the evidence as a whole . . . and while some assessing of the evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible, *it is evident that the question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at a trial.*

(Pet. App. at A17) (emphasis added; citations omitted). The Second Circuit's opinion therefore cannot be fairly characterized, as Apex would have it, as running afoul of this Court's decision in *Monsanto* or Apex' Seventh Amendment rights.

In the final analysis, Apex' quarrel is not with the Second Circuit's application of *Monsanto*, or its asserted conflict with the "slight evidence" rule, or its alleged abrogation of the Seventh Amendment, but rather with the Second Circuit's conclusion—a conclusion reached after a studied review of the evidence against the applicable legal standard. Belcher has a similar quarrel and has filed its own petition for writ of certiorari, and joined in Apex' petition. Those quarrels are not, however, sufficient reason to grant certiorari. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). *See also Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.). Indeed, granting certiorari as to Stinnes would be particularly improvident since both the District Court and the Court of Appeals found, after examining a voluminous record,[10] that Apex did not proffer *any* evidence showing a link between Stinnes and the conspiracy. *See, e.g., Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *Accord Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *Berenyi v. District Director, Immigration & Naturalization Service*, 385 U.S. 630, 635 (1967).

[10] As noted in Apex' Petition, a joint appendix of eleven volumes (over 8000 pages) consisting of portions of over 120 depositions and voluminous document discovery was submitted to the Second Circuit. (Pet. at 7, n.8). And the two lower court's opinions together comprise over 100 pages of the Appendix to the Petition, much of which is devoted to a detailed discussion of the evidence. (Pet. App. at A3-A115).

CONCLUSION

For all of the foregoing reasons, the Petition For A Writ Of Certiorari should be denied.

Dated: November 13, 1987

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No. 87-633

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Supreme Court of the United States

OCTOBER TERM, 1987

APEX OIL COMPANY,

Petitioner,

—against—

JOSEPH DiMAURO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT JULIAN RABER

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court invoke its certiorari jurisdiction to determine whether a unanimous court of appeals panel erred in affirming the district court's determination that there was no evidence that Respondent Julian Raber acted in bad faith—the admittedly applicable standard of liability under the Commodity Exchange Act?

2. Should this Court invoke its certiorari jurisdiction to determine whether a unanimous court of appeals panel erroneously applied the rule of *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 547, 106 S.Ct. 1348 (1986), in determining that Petitioner had failed, on a motion for summary judgment in an antitrust conspiracy case, to adduce "evidence that tends to exclude the possibility" that Respondents acted independently?

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Other

Brief of Commodity Futures Trading Commission, *amicus curiae*, filed August 7, 1987, in *Vaccariello* v. *Financial Partners Brokerage Ltd., et al.* (Nos. 86-2918, 2926, 2936, 2937, 3006, 3008, 3064) (7th Cir. consolidated appeals pending) 8 n.5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-633

APEX OIL COMPANY,

Petitioner,

—against—

JOSEPH DiMAURO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT JULIAN RABER

SUMMARY OF ARGUMENT

This Petition does not involve any "special and important" issue meriting review by this Court. Neither of the questions raised involves a conflict between circuits or an important question of federal law requiring settlement by this Court. Supreme Court Rule 17.1.

(1) The standard of liability under the Commodity Exchange Act for a commodity futures exchange officer applied by the court of appeals—requiring plaintiff to prove that self-interest or another ulterior motive was the sole or dominant reason for the officer's conduct—is the universally applied

standard for judging such conduct. Contrary to the Petition's suggestion, there is no conflict among the circuits on the issue.

(2) The district court, in entering summary judgment for Respondent Julian Raber on Petitioner's antitrust conspiracy claim, and the court of appeals, in affirming that judgment, correctly applied the standard set forth in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986), finding no evidence in the record that "tends to exclude the possibility" that Respondent acted independently.

The opinion of the Court of Appeals for the Second Circuit is reported at 822 F.2d 246. The opinion of the district court is reported at 641 F. Supp. 1246.

STATEMENT OF THE CASE

This action arose because Apex chose not to liquidate its 4,378 short February 1982 No. 2 heating oil futures contracts, thereby obligating itself to deliver approximately 184 million gallons of heating oil on the New York Mercantile Exchange,[1] but was not in a position to deliver in accordance with the Exchange's rules. (Pet. App. at A-43.)[2]

The Exchange is a market on which its clearing members enter into contracts to make ("short") or take ("long") future delivery of various commodities. The Exchange is a self-regulatory body. It adopts rules establishing the terms of

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1 Hereinafter "the Exchange". Respondent Julian Raber ("Raber") was Vice-Chairman of the Exchange during the pertinent time period in 1982. The Exchange and Raber are collectively referred to as the "Exchange Respondents."

2 The following abbreviations will be used in this brief: "Pet." for citation to the Petition for a Writ of Certiorari and "Pet. App." for citation to the Appendix to the Petition.

contracts traded on the Exchange. Commodity Exchange Act ("CEA") § 5a(12), 7 U.S.C. § 7a(12) (1982); 17 C.F.R. § 1.41.

The Exchange, in turn, is closely regulated by the Commodity Futures Trading Commission ("CFTC"), which must approve all contract and trading rules. CEA § 5a(12), 7 U.S.C. § 7a(12) (1982). The Exchange may not enforce rules which have not been approved; once approved, the Exchange must enforce and may not revoke rules. CEA § 5a(8) and (12), 7 U.S.C. § 7a(8) and (12) (1982); 17 C.F.R. § 1.53.

In 1982, Raber was the Vice Chairman of the Exchange, and during the first week of February 1982 (the time period at issue here) served as acting chairman of the Exchange's control committee, which monitored delivery of the February 1982 heating oil contracts.

Apex's complaint, alleging violations of the Commodity Exchange Act and the Sherman Act, is that the Exchange and Raber refused to help it out of its predicament in February 1982 by declining to take emergency action. Apex contends that the Exchange should have altered its delivery rules to permit Apex to deliver, as its amended complaint put it, "reasonably over the course of the delivery month," rather than in accordance with Exchange rules.

The Exchange Respondents were confronted by a trader who had no oil at the facility Apex had designated for delivery (Pet. App. at A-43) and who made false representations concerning the amount of oil it had (and would have) there. (Pet. App. at A-50.) Instead of changing the rules, the Exchange and Raber "jawboned" clearing members representing the longs (who take delivery) and the short (who makes delivery). (Pet. App. at A-33; A-103.) They met with representatives of Apex and the longs (Pet. App. at A-12; A-50), urged flexibility, and discussed ways of resolving the delivery problem. They enforced the rules and reminded Goldman Sachs & Co., the short clearing member acting for Apex, of the penalties for delinquency and default in the event of a failure to deliver. As a result of their efforts, there was no default. (Pet. App. at A-13; A-51.) The

Exchange enforced its rules. Apex, which had no oil, bought a sufficient supply, and the delivery problem was resolved. (Pet. App. at A-13.)

The district court, in a detailed and careful opinion, ruled that there was no evidence of bad faith or of participation by the Exchange or Raber in any conspiracy and granted summary judgment dismissing all claims against them. (Pet. App. at A-96; A-108.) The court of appeals unanimously affirmed, stating that:

> "Apex failed to present evidence tending to show that the Exchange [or Raber] acted or failed to act as a result of self-interest or bad faith as interpreted in a number of this court's decisions." (Pet. App. at A-35.)

The Second Circuit adopted the district court's findings on its dismissal of the Commodity Exchange Act claim and affirmed the district court on its dismissal of the Sherman Act claim, reasoning that the evidence demonstrated good faith " 'jawboning' in an attempt to avert an impending default" and that "Apex has offered no plausible motivation" for the Exchange Respondents' participation in the scheme. (Pet. App. at A-32 to A-33.)

For a complete statement of the case, the Court is referred to the decision of the Court of Appeals for the Second Circuit (Pet. App. at A-7 to A-13) and the decision of the district court. (Pet. App. at A-42 to A-51.)

REASONS FOR DENYING THE WRIT

I.

THE COMMODITY EXCHANGE ACT ISSUE DOES NOT WARRANT REVIEW BY THIS COURT

Petitioner concedes that to prevail on its Commodity Exchange Act claims against the Exchange Respondents, it must establish that they acted in bad faith (Pet. at 16-17); and in a desperate effort to create an issue worthy of review by this Court, it suggests that the circuits are in conflict concerning the standard to be applied in determining that question. There is no such conflict. The Second Circuit correctly applied the applicable bad faith standard to the facts before it in affirming summary judgment for the Exchange Respondents. There is thus no question meriting review by this Court. *See* Supreme Court Rule 17.1.

A. There Is No Conflict Among The Circuits

The two courts of appeals which have addressed the question agree that bad faith is a necessary element of all claims under the Commodity Exchange Act challenging the regulatory conduct of commodity exchanges designated as "contract markets" by the Commodity Futures Trading Commission. A claim will not lie against an exchange or one of its officials unless "self-interest or other ulterior motives unrelated to proper regulatory concerns" is the "sole or the dominant reason" for the action or inaction in question. *Sam Wong & Son, Inc.* v. *New York Mercantile Exchange*, 735 F.2d 653, 677 (2d Cir. 1984); *Ryder Energy Distribution Corp.* v. *Merrill Lynch Commodities Inc.*, 748 F.2d 774 (2d Cir. 1984). *Accord*, *Daniel* v. *Board of Trade*, 164 F.2d 815 (7th Cir. 1947); *Lagorio* v. *Board of Trade*, 529 F.2d 1290 (7th Cir.), *cert. denied*, 426 U.S. 950 (1976). In *Ryder Energy*, the Second Circuit stated the rule concisely:

> "A claim of bad faith must be supported by two allegations: first, that the exchange acted or failed to act with

knowledge; *and second, that the exchange's action or inaction was the result of an ulterior motive*." *Ryder Energy*, *supra*, 748 F.2d at 780, emphasis added.

Apex urges this Court to ignore the second part of this accepted test and suggests that bad faith may be established "where an exchange knows of a manipulation but fails to take any action to prevent it." (Pet. at 15.)[3] It goes on to suggest that "the federal courts are in conflict" as to the meaning of the bad faith standard. (Pet. at 14.) Apex supports this proposition with a series of district court decisions, all of which pre-date the Second Circuit's opinions in *Sam Wong* and *Ryder Energy*;[4] an inapposite Second Circuit case decided forty years before these decisions; and two Seventh Circuit opinions, both of which are also inapposite. (Pet. at 19, nn. 14, 13, 12.) None of those decisions conflicts with the Second Circuit's decision here. The Petition therefore does not "call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a).

The two Seventh Circuit decisions are not in conflict with the Second Circuit's bad faith standard. *Deaktor* v. *L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973), does not even address the standard of liability. "The sole issue in [that case was] whether the district court could take jurisdiction of

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3 This plainly disregards the Second Circuit's *Sam Wong* opinion which makes it clear that the "ulterior motive" standard applies both to exchange actions and to alleged exchange inaction: "[A] plaintiff . . . [will] have the initial burden of showing that ulterior motive, *e.g.*, financial gain or personal animosity, was 'a substantial or motivating factor' in the *taking of or failure to take action*." *Sam Wong*, *supra*, 735 F.2d at 677, emphasis added, citations omitted. *See also*, *Ryder Energy*, *supra*, 748 F.2d at 780 ("we have recently made it clear that the bad faith requirement governs claims of both exchange action and inaction.").

4 Significantly, all but one of these decisions were by district judges in the Southern District of New York who are obviously bound by the controlling decisions of the Second Circuit, including the decision below in this case.

these actions or whether the Commodities Exchange Commission properly has primary jurisdiction over these proceedings." 479 F.2d at 531. The opinion contains no discussion of the standard of liability because that issue was not before the court.

As for *Hochfelder* v. *Midwest Stock Exchange*, 503 F.2d 364 (7th Cir.), *cert. denied*, 419 U.S. 875 (1974), it too does not address the bad faith standard; indeed, the phrases "bad faith" or "good faith" do not appear in the opinion. That case, which involved a claim against a *stock* exchange (not a commodities exchange) for failure adequately to supervise a broker who engaged in misconduct, held that where a stock exchange had knowledge or reason to know of a violation by one of its brokers, "a failure to proceed with the requisite due care and conduct would be a dereliction of the duty of self-regulation." 503 F.2d at 368. Unlike the present case, *Sam Wong*, or the other cases applying the bad faith standard, *Hochfelder* did not involve an exchange's duty to regulate trading. It involved only an exchange's duty to supervise its member brokers. For this reason, the delicate balancing approach which the bad faith standard implements for exchange market regulation was not required. In this case, like *Sam Wong*, a bad faith standard is required in order to permit that important balance. As the Second Circuit noted in *Sam Wong*:

> "[The bad faith standard] takes into account the competing needs of exchanges and their officials and of the trading public. Although governors must be able to police the markets effectively with the broad discretion accorded by Congress, traders must not be deprived of their right to challenge illegitimate regulatory action. The Commodity Exchange Act, which embodies the statutory model of exchange self-regulation, mandates that we strike a balance that does not insulate exchange officials from answering serious questions posed by injured traders. To do otherwise would drastically curtail the private right of action deemed essential to the regulatory framework established by Congress. Therefore, when self-interest or

other ulterior motive unrelated to proper regulatory concerns is alleged to constitute the sole or the dominant reason for the exchange action, a complaint is sufficient even though the action was not beyond the bounds of reason. On the other hand, if the governors sincerely and rationally believe their action is in the public interest, there should not be liability simply because the action has the incidental effect of advancing their private interest or damaging someone whom they do not like." 735 F.2d at 677.[5]

The fact that there is no conflict between the Seventh Circuit and the Second Circuit as to the bad faith standard is conclusively demonstrated by the Seventh Circuit decisions which have applied that standard. In *Lagorio* v. *Board of Trade*, 529 F.2d 1290, 1291-92 (7th Cir.), *cert. denied*, 426 U.S. 950 (1976), the Seventh Circuit affirmed summary judgment in favor of a

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5 Apex relies on an *amicus* brief filed by the CFTC in a different appeal. (Pet. at n. 11.) That case involved a claim of exchange responsibility for an elaborate scheme to defraud investors which was perpetrated by one of its members—the identical situation as in *Hochfelder*, *supra*. In that *amicus* brief, the Commission principally argued that the knowledge requirement set forth as the first part of the two-part test of *Ryder Energy* should include constructive as well as actual knowledge. *See* Brief of Commodity Futures Trading Commission, *amicus curiae*, filed August 7, 1987, in Vaccariello v. Financial Partners Brokerage Ltd. (Nos. 86-2918, 2926, 2936, 2937, 3006, 3008, 3064) (7th Cir. consolidated appeals pending). Most significantly, in that brief the Commission acknowledged that the ulterior motive requirement (the second part of the two-step *Ryder Energy* test) "has evolved principally in the context of acts or omissions by exchanges' boards in response to emergency situations" (like the situation here), noting that "the ulterior motive requirement, which focuses on the existence of pecuniary conflicts of interest may be useful in evaluating discretionary emergency actions of exchange governing boards." *Id.* at 17. Indeed, Apex itself concedes that "exchanges must have discretion to respond to manipulation in the manner they judge best. . . ." (Pet. at 18.)

commodities exchange where the court found that the complained-of actions were "taken in good faith by a commodity exchange . . . in the exercise of its regulatory duties." 529 F.2d at 1292. And in the seminal case of *Daniel* v. *Board of Trade*, 164 F.2d 815 (7th Cir. 1947), the Seventh Circuit held that a claim would not lie against a commodity exchange relating to its exercise of emergency powers "in the absence of an averment of bad faith amounting to fraud." 164 F.2d at 819.

B. The Courts Below Correctly Found No Bad Faith

Applying the bad faith standard of *Sam Wong* and *Ryder Energy*, the district court and the Second Circuit found that there was no evidence of bad faith by Raber or by the Exchange, and accordingly granted them summary judgment. (Pet. App. at A-35; A-102.) Apex never alleged—and certainly offered no evidence—that Raber or the Exchange had any personal interest in the February heating oil deliveries or any bias toward any participant in the deliveries. Raber and the Exchange acted to address a delivery problem that would not have occurred if Apex had been in a position to deliver—but it was not. (Pet. App. at A-12; A-50.) Raber had no interest in the deliveries, nor could he look forward, as a result of his actions, to any personal gain. (Pet. App. at A-102.) Raber and the Exchange simply did not act with "self-interest or other ulterior motives" as the "sole or dominant reason" for their actions. *Sam Wong*, *supra*. As the district court pointed out, "Apex's true quarrel with the Exchange is that it failed to interpret the rules as Apex would have liked. This does not raise an issue of bad faith." (Pet. App. at A-105.)

Moreover, even if the standard of Exchange liability urged by Apex—requiring mere knowledge plus inaction—were applied, summary judgment was still properly granted. The district court found that there was "insufficient probative evidence either of a conspiracy to manipulate or that the exchange defendants knew of any such conspiracy." (Pet. App.

at A-103.) That finding was affirmed by the Second Circuit. (Pet. App. at A-35.)

In short, the dispute between the parties under the Commodity Exchange Act turns on the application of a universally accepted rule of law to the peculiar facts at issue. No question warranting review by this Court is raised.

II.

THE DISMISSAL OF THE ANTITRUST CONSPIRACY CLAIM AGAINST RABER DOES NOT MERIT REVIEW BY THIS COURT

Less than two years ago this Court settled the methodology pertinent to determining a motion for summary judgment in an antitrust conspiracy case. *Matsushita Electrical Industrial Co. Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). Quoting *Monsanto Co.* v. *Spray-Rite Service Co.*, 465 U.S. 752 (1984), the Court set forth the governing standard:

> "To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 *must present evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently*. 465 U.S., at 764, 104 S. Ct., at 1471. Respondents in this case, in other words, *must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents*." 475 U.S. at ____, 106 S.Ct. at 1357, emphasis added.

The courts below, after a thorough review of the record, "concluded that Apex has failed to present evidence linking the Exchange defendants to a conspiracy . . . ." (Pet. App. at A-33.) Apex offers no basis for this Court to exercise its certiorari jurisdiction to review the lower courts' analysis of the facts or their careful application of *Matsushita* to those

facts.[6] Apex's argument as to its second question is nothing more than its disagreement with the lower courts' application of the controlling legal standards to a complex factual situation, which was thoroughly disclosed in the record and fully briefed below. The second question does not present any "special and important reasons" for this Court to exercise its judicial discretion by granting certiorari. Supreme Court Rule 17.1.

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6 Apex argues that because the court of appeals found that there was sufficient evidence to submit to the jury the question of whether there was a conspiracy among three of the long defendants (oil traders who, Apex argued, stood directly to gain from the purported conspiracy—unlike Raber or the Exchange), it need only present "slight evidence" to link any other defendant to the conspiracy. (Pet. at 21.) It supports that argument with a group of cases which were all decided before this Court's *Matsushita* decision. Thus the "slight evidence" cases do not eliminate the *Matsushita* requirement that Apex "must present evidence that tends to exclude the possibility that" Raber acted independently. 475 U.S. at _____, 106 S.Ct. at 1357. The courts below correctly found that there was no such evidence.

Even if a "slight evidence" standard were applicable, there is no reason to grant certiorari, since the court of appeals considered Apex's evidence against Raber in light of that standard and nonetheless found *no* evidence linking Raber to the alleged conspiracy:

> "while we . . . remain aware that ' "once a conspiracy is shown, only slight evidence is needed to link another defendant with it," ' *Wilkinson*, *supra* [United States v. Wilkinson, 754 F.2d 1427, 1436 (2d Cir.), *cert. denied*, 472 U.S. 1019 (1985) (a case relied on by Apex in its Petition (Pet. at 21))], since we do not find such a link, we conclude that affirmance of the grant of summary judgment is appropriate as to the remaining defendants." (Pet. App. at A-28.)

The correctness of the court of appeals' application of the "slight evidence" standard to the facts in this case is surely not a "special and important" issue warranting review by this Court. Supreme Court Rule 17.1.

CONCLUSION

For all of the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
November 20, 1987

Respectfully submitted,

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No. 87-633

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. The Conflict Among The Federal Courts On The First Question Presented Is Apparent, Direct, And Ripe For Adjudication By This Court

The brief filed on behalf of Respondent New York Mercantile Exchange demonstrates the existence of conflicting standards of bad faith among the federal courts. The exchange notes, quite correctly, that the definition of bad faith is now settled in the Second Circuit. It points to *Sam Wong & Son, Inc. v. New York Mercantile Exchange*, 735 F.2d 653, 677 (2d Cir. 1984), which first established the definition, and *Rider Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774 (2d Cir. 1984), which merely reiterated it.[1] There is no dispute that these

[1] The Exchange oddly faults Apex's Petition for not citing *Rider Energy*.

cases require that a party seeking to establish a claim of bad faith demonstrate that " 'self-interest or other ulterior motive unrelated to proper regulatory concerns' is the 'sole or the dominant reason' for the action or inaction in question." Brief in Opposition of Respondent New York Mercantile Exchange at 5 (*quoting Sam Wong*). However, neither of these decisions was reviewed by this Court, and the first question presented in Apex's Petition challenges the standard of bad faith they articulate, which admittedly was applied in this case.

In support of its Petition, Apex cited conflicting articulations of the bad faith standard in the Seventh Circuit. The Exchange tries to avoid this direct conflict by pointing to the recent Second Circuit decision in *Brawer v. Options Clearing Corp.*, 807 F.2d 297 (2d Cir. 1986), *cert. denied*, 56 U.S.L.W. 3243 (U.S. Oct. 5, 1987) (No. 86-1825) (declining to follow *Baird v. Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944)), also not reviewed by this Court, which established that the *Sam Wong* definition of bad faith governs *all* claims addressed to regulatory conduct of contract markets, including the failure to prevent or to remedy broker misconduct.

It is no small observation to note that the United States Court of Appeals for the Second Circuit lacks jurisdiction to overrule cases in sister circuits. That is a jurisdiction that may be exercised only by this Court. As Apex demonstrated in its Petition, the standard of bad faith adopted for all cases in the Second Circuit does not strike the proper balance between exchange autonomy and investor protection and is in conflict with decisions of other Federal Courts. For these reasons, Apex's Petition should be granted and the first question presented resolved in its favor.

II. The Issues Presented By Apex Alone Warrant Consideration By This Court

The brief filed on behalf of the Belcher Respondents in support of Apex's Petition for Certiorari attempts to bolster Belcher's own Petition by maintaining that *both* petitions seek review of the same issues – whether the Court of Appeals properly applied the "slight evidence" standard. Even a cursory review of the opinion below, coupled with the undisputed procedural posture of the case at hand, demonstrates the utter lack of merit to Belcher's position.

Because the court below considered Belcher an integral and decisive factor in the conspiracy at issue, it did not analyze its liability by using the "slight evidence" standard. Rather, the reversal as to Belcher was based on the application of the standards set forth by this Court in *Matsushita* and *Monsanto*. In direct contrast to the case against the other defendants presented in Apex's petition, it is completely irrelevant whether the "slight evidence" test should have been applied to Belcher because the Court of Appeals held that the evidence that Belcher participated in the conspiracy met the more rigorous tests of *Matsushita* and *Monsanto*.

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